E. B. Wells
Rec'd Sept. 21. 1915

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS OF COLORADO

AT THE

APRIL AND SEPTEMBER TERMS, A. D. 1914.

E. T. WELLS
REPORTER

VOLUME 26

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COURT OF APPEALS OF COLORADO

JUDGES OF THE COURT DURING THE TIME OF THESE REPORTS.

LOUIS W. CUNNINGHAM, *Presiding Judge.*

ALFRED R. KING
EDWIN W. HURLBUT
WILLIAM B. MORGAN
JOHN C. BELL

Associate Justices.

JUDGES OF THE DISTRICT COURT

AT THE PUBLICATION OF THESE REPORTS

Harry S. Class, Brighton, Colo.....First Judicial District.
W. D. Wright, Sr., Denver, Colo.....Second Judicial District.
Charles C. Butler, Denver, Colo.....Second Judicial District.
John Perry, Denver, Colo.....Second Judicial District.
George W. Allen, Denver, Colo.....Second Judicial District.
John H. Denison, Denver, Colo.....Second Judicial District.
A. Watson McHendrie, Trinidad, Colo.....Third Judicial District.
Granby Hillyer, Lamar, Colo.....Third Judicial District.
J. W. Sheafor, Colorado Springs, Colo.....Fourth Judicial District.
J. E. Little, Colorado Springs, Colo.....Fourth Judicial District.
W. S. Morris, Colorado Springs, Colo.....Fourth Judicial District.
Charles Cavender, Leadville, Colo.....Fifth Judicial District.
Wm. N. Searcy, Durango, Colo.....Sixth Judicial District.
Thomas J. Black, Montrose, Colo.....Seventh Judicial District.
Neil F. Graham, Fort Collins, Colo.....Eighth Judicial District.
Robert G. Strong, Greeley, Colo.....Eighth Judicial District.
John T. Shumate, Glenwood Springs, Colo...Ninth Judicial District.
Chas. S. Essex, Pueblo, Colo.....Tenth Judicial District.
J. Ed. Rizer, Pueblo, Colo.....Tenth Judicial District.
Chas. A. Wilkin, Canon City, Colo.....Eleventh Judicial District.
Jesse C. Wylie, Alamosa, Colo.....Twelfth Judicial District.
Haslett P. Burke, Sterling, Colo.....Thirteenth Judicial District.

Rules of Practice and Procedure in Civil Causes.

Adopted by the Supreme Court June 19th, 1914, by authority of the Act of an Act of the General Assembly (Laws 1913, 447).

Effective September 14, A. D. 1914.

1.—*Allegations common to each cause of action, count or defense need not be repeated—Copies of instruments may be attached as exhibits.*

In a complaint, cross-complaint, or answer, embracing several causes of action, counts or defenses, matters or allegations common to each cause of action, count or answer, need not be repeated, but in an appropriate manner may be briefly referred to and made a part of the cause of action, count or defense following. Copies of written instruments may be made a part of a pleading by being attached thereto and referred to in the pleading as exhibits.

2.—*Summons—By whom issued—Dismissal of action.*

Summons shall be issued by the clerk only, and under the seal of the court, but not until after the complaint is filed. Plaintiff may have a summons issued at any time within thirty days after filing his complaint. If not issued and delivered within that period, the clerk shall enter an order dismissing the action.

3.—*Service of notice of motion by mail.*

Service of notice may be by mail as prescribed in Chapter 37, Revised Code, 1908, and when so served the time shall be increased above that to be given where service is personal, one day for every one hundred and twenty-five miles, or fraction thereof, between the place of deposit and the place of address.

4.—*Motion to quash process or service—General appearance—Exceptions.*

A motion to quash a summons or *scire facias* or service of either shall not be entertained, but shall be deemed a general appearance by the party making such motion. This rule shall not apply where the moving party claims exemption from service of process, nor to service of process on minors or persons judicially declared incapable of conducting their own affairs.

5.—*Demurrer for insufficiency or want of jurisdiction must specify grounds—Penalty for failure.*

A general demurrer to a pleading, or one challenging the jurisdiction of the court shall specify in detail the grounds upon which it is based. If it fails to do so it shall be disregarded. If at the trial a pleading is attacked upon the ground of its insufficiency, or for the reason that the court is without jurisdiction, where a demurrer upon either of these grounds was not filed, or if filed, did not specify or point out the question raised for the first time at the trial, the party whose pleading is thus assailed may amend as of course, and the trial proceed, or if necessary in order to procure evidence the cause may be continued at the cost of the party failing to comply with this rule.

6.—*Statement filed with answer in actions on contracts for payment of money—Judgment for plaintiff if statement does not disclose defense.*

In actions upon writen contracts for the payment of money, the defendant, when he files his answer, shall in addition file a verified statement setting up the nature and substance of his defense. If it appears from such statement that his defense is without merit or is sham, the court, upon motion of plaintiff and notice to defendant, shall give judgment for plaintiff for such sum as he shall establish by requisite proof.

7.—*Statement defining issues of fact—Certificate thereof filed.*

When it appears that the issues of fact are not clearly defined by the pleadings, the parties before trial, on motion of either, or by order of the court or judge, may be directed to prepare and sign a statement defining such issues. If they do not agree, such issues shall be settled by the court or judge. The trial of facts shall be limited to those thus fixed. The statement of such issues shall be filed with the clerk, and with the exceptions thereto, if any, duly noted thereon, signed by the judge, shall become a part of the record in the cause. Such statement may be amended.

8.—*Docketing cause when place of trial is changed—failure to do so—Order vacated.*

In case of change of place of trial of an action the party at whose instance such change is granted shall docket the cause in the court to which it was transferred within fifteen days after the transfer was ordered. On failure to do so, the court ordering the change, on motion of the adverse party and notice to opposite counsel, with proof of such failure, shall set aside the order of transfer and shall thereupon be reinvested with full jurisdiction of the cause for all purposes, except where the change was ordered on account of the disqualification of the judge, in which instance a competent judge shall be secured to try the cause, unless the parties agree upon an attorney to preside at the trial. The party at whose instance the place of trial was changed shall not be permitted to apply for another change upon the same ground.

9.—*When dismissal or non-suit bars another action.*

The dismissal of an action upon the ground that the testimony does not establish the cause of action involved, or a judgment of non-suit for the same reason, is a final determination of the merits of such action, and bars a new action between the same parties or their privies on the same cause of action, unless the court shall dismiss or direct judgment of non-suit without prejudice.

10.—*Retrial may be limited to specific questions of fact.*

Upon a motion for a new trial, the court may, when practical, order a retrial of such questions of fact with respect to which error was committed or which were not established, leaving those properly established to stand.

11.—*Each district court to establish time in each county for hearing of preliminary matters.*

Each district court shall establish one or more times between terms in each county of the district, as the transactions of business may require, for the hearing and disposition of demurrers, motions, and other preliminary and interlocutory matters. The times thus fixed shall be so arranged as not to materially interfere with other official duties of the judge or judges in any county in the district.

12.—*District court to provide rule for dismissal of actions.*

Each district court shall by rule provide for the dismissal of actions not prosecuted or brought to trial with due diligence.

13.—*Instructions—Objections how made—Review limited to such objections.*

Counsel shall present to the trial court, at or prior to the close of the evidence, such instructions as they may desire. The court shall afford respective counsel a reasonable time and opportunity to examine proposed instructions, whether requested, or to be given by the court of its own motion, and to prepare and present objections thereto before given to the jury. Such objections shall specify briefly the particulars wherein instructions are defective or not correct, be directed to each instruction separately, and on motion for new trial, or on review by the supreme court or court of appeals, only the grounds so specified shall be considered. They shall be in writing, signed by counsel making them, and, together with the exceptions to the ruling of the court noted thereon, attested by the trial judge, filed with the clerk, and thereupon shall become a part of the record in the case.

14.—*Writ of error—Limitation one year—Saving clause.*

A writ of error shall not be brought after the expiration of one year from the date of the rendition of the judgment complained of; provided, that as to judgments rendered prior to the date these rules take effect, a writ of error may be brought at any time within one year from that date, if that period is within three years from the rendition of such judgment. Where a person thinking himself aggrieved by any judgment or decree, reviewable on error, shall be an infant or *non compos mentis,* when the same was rendered, the time of such disability shall be excluded from the computation of said year. This rule shall not apply to divorce or other special proceedings otherwise limited.

15.—*Order appointing or denying receiver may be reviewed.*

An order appointing or denying the appointment of a receiver may be reviewed on error before final judgment, if prompt application for that purpose is made.

16.—*Stay of execution pending application for supersedeas.*

The second paragraph of section 6 of Chapter 6, entitled "Appeals and Writs of Error," Session Laws of 1911, page 9, is hereby amended to read as follows: Execution shall stay until the expiration of said five days, and upon motion within said five days the trial court shall grant a further stay of execution not exceeding thirty days from the time of entry of judgment pending application to the supreme court for a supersedeas. If within this period plaintiff in error dockets the cause in the supreme court on error, by filing a verified statement setting out the nature of the action, the issues and judgment, and date of entry thereof, together with such rulings and other matters complained of, from which it appears the trial court may have committed error to his prejudice, the supreme court shall have power upon terms to stay such execution pending such supersedeas application for an additional period not exceeding ninety days. Such writs of error shall be amendable upon order of the supreme court in any matter wherein they are at variance with the record in the case so as to make them agreeable to such record.

17.—*Procedure on application for supersedeas.*

On application for a supersedeas, counsel for plaintiff in error shall at the same time, or within such time as may be granted, file a brief in support thereof, and serve upon counsel for defendant in error a notice of such application and copy of his brief, who may within ten days thereafter file a written brief in opposition, a copy of which shall be served upon counsel for plaintiff in error, who may reply thereto within five days. The application shall then stand submitted.

18.—*If supersedeas denied court may dismiss or affirm.*

When an application for a supersedeas is denied the supreme court in its discretion may dismiss the proceeding or affirm the judgment.

19.—*Motion for new trial necessary—Review limited to questions thus raised.*

Before a review of the judgment rendered in a contested cause can be had before the supreme court, the party claiming to be aggrieved by such judgment shall file with, and there shall be considered by the trial court, a motion for a new trial within the time and manner prescribed by a code of civil procedure. On review, only the questions thus presented to the trial court will be considered.

20.—*Record on error.*

A party desiring to have any final judgment, or reviewable order of a court of record, or a judge thereof, reviewed by the supreme court, may make a record on error containing a statement of so much of the pleadings, proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of.

(a) Such record shall contain the assignment of errors relied on, together with so much of a transcript of the pleadings and record proper as shall be necesary or essential to a proper consideration by the supreme court of the errors assigned; and so much of the evidence, rulings, orders, instructions, objections and exceptions, occurring upon the trial of the cause, as may be necessary for such purpose. Where error is assigned on instructions, the record must contain all instructions given, and those requested by plaintiff in error and refused. Where error is assigned on the giving or refusal of an instruction, or upon the insufficiency of the evidence to sustain the judgment, the substance of all evidence necessary to properly consider such assignment must be set forth in the record.

(b) The evidence to be included in the record on error shall not be set forth in full, but shall be stated in simple and condensed form. That not essential to the decision of the questions presented by the assignments shall be omitted. The testimony of witnesses shall be stated in narrative form save that, if either party desires it, any part of the testimony may be reproduced in the exact words of the witness.

(c) The duty of preparing the record on error shall rest primarily upon the plaintiff in error, who shall, within sixty days from the date the motion for a new trial is denied, serve the original, or a copy thereof, upon the opposing parties or their attorneys, who may within thirty days thereafter suggest amendments thereto in writing and present the same to the party preparing the record, or his attorney. Such record and suggested amendments shall be submitted to the trial judge within ten days thereafter. At the expiration of the time named, or such further time as the court or judge may allow, such record, together with any objections or amendments proposed by any party, shall be considered by the judge, and if the statement be true, complete and properly prepared, it shall be

approved by the judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the judge, and shall then be approved by him. When approved and certified it shall be filed in the clerk's office and become the record for the purpose of the proceedings on error.

(d) In preparing the record, care shall be taken to avoid the inclusion of more than one copy of the same paper, and to exclude the formal and immaterial parts of all exhibits, documents, entries and other papers or evidence; and for an infraction of this or any kindred rule, the supreme court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. If in the record on error anything material to either party be omitted by accident or error, the appellate court may direct the omission to be corrected by supplying such omission. The record on error, when settled and signed, shall be certified by the trial judge, which certificate shall show that the judge has fully and carefully examined and considered the record so made, in connection with the assignments of error, and cross-error, if any such be assigned, and that in his judgment the same contains all parts of the record, proceedings and evidence in the case, necessary or essential to a review of the errors or cross-errors assigned. The record on error shall then be filed with the clerk of the trial court, and certified by him, without being transcribed to the supreme court and shall constitute the sole record on review, subject only to amendment allowed by the appellate court.

(e) The court or judge may, upon good cause shown, extend the time for preparing the record on error, and the time within which such record may be served: and the time when the same may be presented for settlement, after it has been made, served and amendments suggested. In all cases heretofore and hereafter tried, when the term of the office of the trial judge shall have expired, or may hereafter expire, before the time fixed for making and settling, signing and certifying a record, it shall be the duty of the judge who tried the cause to sign and settle the same in all respects as if his term had not expired. If no amendments are suggested by the opposing party, within the time allowed, the judge shall settle, sign and certify the record in manner and form as above provided. When, by virtue of the provisions of the code, a bill of exceptions may be preserved by affidavits, a record on error may be similarly preserved.

(f) Whenever the appellate court directs that an omission in the record be supplied, it shall be by supplemental record, approved and certified by the trial judge and filed with the clerk of the trial court and shall become a part of the record on error and be certified and transmitted accordingly.

(g) The record on error shall be folioed and indexed. It shall also be abstracted in the manner now or hereafter provided by the supreme court in its rules on that subject. Such abstract shall also be properly indexed.

21.—*Agreed record on error.*

The parties to an action, after final judgment, may agree upon a record on error in the following manner: (a) File with the clerk of the trial court an assignment of errors. (b) Prepare and sign a statement of the case, showing how the questions assigned as error arose and were decided in the trial court, and setting forth so much of the facts alleged and proved or sought to be proved, and other matters essential to a decision of such questions by the supreme court. If such statement be approved by the trial judge by a certificate to the effect that it is true

and correct, and embraces all matters presented at the trial which are necessary for the supreme court to consider in passing upon the errors assigned, it shall be filed with the clerk of the trial court. When so filed, and a certified copy of the judgment rendered in the cause attached, together with the assignment of errors, it shall be certified by the clerk to the supreme court as the record on error.

22.—*Abstract of record—How prepared—Supplemental abstract.*

Rule 14, adopted by the supreme court, April 5, 1905, is supplemented as follows: The abstract of record shall contain a brief statement of the contents of the pleadings, orders and judgment, except where from the nature of the questions raised it is necessary to state them in full. All other parts of the record shall be summarized and stated in condensed form, save where from the character of the questions raised by the assignment of errors, it is essential that testimony be reproduced in the exact words of the witness. Where error is assigned on instructions, those given, as well as those requested by plaintiff in error and refused, shall be stated in full. The abstract shall contain the assignment of errors and be indexed in such manner that orders, pleadings, evidence, and all matters therein contained may be readily referred to. The object of this rule is to have the abstract present only such a summary of the record as is necessary to consider and determine the questions raised by the assignment of errors, and for its violation in this respect costs may be imposed or withheld. If by accident or error, anything material to either party is omited from the abstract, such omission may be supplied by a supplemental abstract.

23.—*Abstracts and briefs—How printed.*

Abstracts and briefs shall be printed on blue white—wove antique—finish book paper of a weight the basis of which shall be eighty pounds to the ream, 25 by 38 inches in size. The abstract of record shall contain on the front cover, the title of the case, the court to which the writ of error lies, and the name of the trial judge.

24.—*When costs taxed to plaintiff in error on reversal.*

When a judgment is reversed by the supreme court or court of appeals for insufficiency of a pleading or for want of jurisdiction of the trial court, and for either of these reasons only, upon any ground not called to the attention of the trial court, in conformity with Rule 5 hereof, the costs in the appellate court, as well as in the trial court, shall be taxed to the party securing a reversal in such circumstances.

25.—*Retrial of specified questions of fact.*

The supreme court and court of appeals on reversing a judgment may order a retrial of specified questions of fact, and direct that specific questions of fact stand as established when it appears that neither party to the action will be prejudiced by such order.

26.—*Copies of opinion furnished counsel.*

In all cases where a written opinion is handed down the clerk shall mail a copy to one attorney upon each side of the case.

What these rules supersede—when take effect.

These rules supersede all statutory and Code provisions and rules and parts thereof, in conflict therewith, and shall take effect on and after the second Monday in September, 1914.

How printed and published.

Five thousand copies of these rules shall be printed and published in convenient form, under the supervision of the clerk, who shall certify the same under the seal of the court. He shall mail a copy to each of the judges of the courts of record and a sufficient number to the clerk of the district court in each county to supply a copy to each practicing attorney in his county. On receipt of such copies, the district clerk shall deliver each attorney in his county one copy.

To the judiciary and bar of the state:

In other jurisdictions, efforts have been made, from time to time, to simplify procedure in civil actions. Many reports and recommendations of bar associations intended to bring about this result have been examined and it is gratifying to learn from these sources that our civil code embraces substantially all provisions which members of the bar in other states have recommended to be incorporated in the civil codes of their respective states. Our own code is therefore so complete that it has not seemed advisable to do more than supplement it with a few rules and amendments, which in connection with existing code provisions, it is thought will be of assistance in simplifying procedure and thus result in accelerating the disposition of causes and the reduction of expenses to litigants, particularly in the matter of review. In this respect provision is made whereby alleged errors must be fully presented to, and considered, by the trial court and for confining a review to the questions thus presented.

The efficacy of code provisions and rules, however, must to a great extent depend upon their observance by the bar and their enforcement by the courts.

The court desires also to impress upon trial courts, the members of the bar, and the community at large, a clearer appreciation of the power, dignity and responsibility of trial courts, contemplated by the constitution. Original jurisdiction is expressly conferred upon district courts to try all causes, both at law and in equity, whatever their magnitude; while the powers of the supreme court, with certain designated exceptions, are confined to appellate jurisdiction.

The necessity for the exercise of the utmost care by trial courts and counsel in avoiding error, together with the fullest opportunity for correction, is apparent. The careful observance of this duty must tend to reduce the number of cases brought before the supreme court, and to minimize the number of errors in those cases which are by it to be considered, thus tending to a more speedy administration of justice.

The supreme court invites the earnest co-operation of trial courts and members of the bar, in the accomplishment of these purposes, and indulges the hope that the rules and amendments now adopted may be found to be helpful.

IN MEMORIAM.

ADAIR WILSON.

On Monday, the 13th day of July, A. D. 1914, the Court sitting *en banc*, certain resolutions adopted by the San Luis Valley Bar Association, in commemoration of the late Adair Wilson, formerly one of the Justices of this Court, were presented by Mr. Charles D. Hayt and Mr. Julius C. Gunter, and with the remarks made upon the occasion, were ordered spread upon the records of the Court.

Mr. Hayt, in presenting the resolutions, spoke as follows:

MAY IT PLEASE THE COURT:

It was my good fortune to have enjoyed the friendship of Judge Adair Wilson for more than thirty years and I deem it a great privilege at this time to comply with a request of the San Luis Valley Bar Association by presenting the resolutions adopted by that body, and supplementing the same with some deductions based upon my long personal acquaintance with the distinguished deceased.

The resolutions are as follows:

> BE IT RESOLVED, By the San Luis Valley Bar Association, that it is with profound regret and deep sorrow that we learn of the death of Hon. Adair Wilson, who for many years was a member of the bar of this district and a Judge of the Court of Appeals of this State.
>
> He was a manly man, a true friend, an able lawyer and a just judge; and in the drama of life he played well his part and now rests from his labors.
>
> *Resolved*, That we extend to his family our earnest sympathy and condolence.
>
> *Resolved*, That as a mark of our esteem, these resolutions shall be spread on the records of our Association and that copies of the same be delivered to the Clerk of the District Court of Rio Grande County and to the Appellate Courts of this State, with the request that the resolutions be made a part of the records of said courts.
>
> CHARLES C. HOLBROOK,
> GEO. P. WILSON,
> EZRA T. ELLIOTT,
> Committee.

Adair Wilson was born in Saline County, Missouri, November 16, 1841. He graduated at the Masonic College at Lexington in 1858. His father, William Adair Wilson, a native of Virginia, was a lawyer of distinction, enjoying a lucrative practice first in his native state and afterwards in the State of Missouri, where he died in 1865. The mother was a daughter of Col. Benjamin Reeves, of Kentucky. Adair was admitted to the Bar of Missouri in the year 1860 and soon thereafter came to Colorado where he remained a short time and then proceeded to San Francisco, at which place he was admitted to the bar of the

State of California. Shortly after admission he settled temporarily in Virginia City, Nevada, devoting his time to newspaper work, as editor of the Virginia City Union. After a brief sojourn at Virginia City, he moved to Austin, Nevada, another famous mining town, and there became the editor of the Reese River Reveille.

It was in Virginia City that he first became acquainted with Samuel L. Clemens (Mark Twain), who was then the editor of the Virginia City Enterprise, a rival paper. By reason of being engaged in the same profession, similarity of literary tastes and work and congeniality of temperament, the two became fast friends, which friendship lasted until the death of Mr. Clemens. Correspondence between these two friends was kept up for more than forty years, and the letters which passed between them are replete with interesting reminiscences, expressions of warm friendship, and are models of literary style and excellence.

In 1864, Wilson left the coast and returned to his native state, where he took up the practice of law, and to some extent engaged in politics. A fluent writer and an excellent public speaker, he soon took high rank at the bar and in politics.

The spirit of the West had, however, secured a firm hold upon him, and its allurements proving irresistible, he returned to Colorado in 1872, and was a citizen of Colorado from that time until his death, locating first in South Pueblo.

In 1873, Mr. Wilson settled in Del Norte, the then gateway to the San Juan, and a very prosperous town, where he remained until 1890, when he removed to La Plata County and engaged in the practice of his profession in Durango, the metropolis of southwestern Colorado.

His political affiliations were always Democratic. A fluent and convincing talker, his services upon the stump were in demand in every campaign and proved of great benefit to his party. Elected to the Council of the last Legislature of the Territory of Colorado, upon the convening of that body he was selected as its president. In 1876, he was a delegate from Colorado to the National Democratic Convention. In 1880 he was nominated by his party by acclamation for governor; but declined the honor. He was elected to the State Senate in 1896, from the Twenty-first Senatorial District, comprising the counties of Rio Grande, Saguache, Hinsdale, Ouray, San Miguel, San Juan, Dolores and La Plata.

As State Senator, Mr. Wilson realized that under modern conditions oratory is of little avail in shaping legislation and devoted his time rather to committee work than as a participant in debates. His ability and tactfulness stood him in good hand in his legislative career and he served his term of four years with credit to himself and to the entire satisfaction of his constituents.

In 1897, Governor Adams appointed Mr. Wilson as one of the judges of the Court of Appeals for the term of six years. At the close of his term he returned to his home city, Durango, and formed a partnership with Mr. Rees McCloskey, under the firm name of Wilson & McCloskey. Shortly thereafter, his health failing to some extent, he took a trip to the Orient. After his return he continued the practice of law until failing health compelled him to give up work.

He died at the home of his daughter, Mrs. Austin H. Brown, at Oakland, California, on the 7th day of January, A. D. 1911, and was buried in a plot in a nearby cemetery overlooking San Francisco bay.

I became acquainted with Mr. Wilson in the year 1876, and this acquaintance soon ripened into friendship, which lasted until his death. We lived in the same section of the state and were frequently together for days attending the courts in the various counties in southern Colorado, and I esteem it a great privilege to bear witness at this time to the many virtues which my esteemed friend possessed.

One of those great-hearted men whose interest in and love for his fellowman was unbounded, he was at all times ready to do a service for a friend or aquaintance and enlist in the advancement of the welfare and prosperity of every community in which he lived. The San Juan has had few men so well known throughout the state as Adair Wilson and it was there his usefulness was demonstrated. He not only did much towards making known the resources of that great section, but to his efforts more than to those of any other is due the credit for securing from the Ute Indians, a relinquishment of the Indian title to that great empire. Loyalty to his friends and to the community in which he resided were characteristic.

A benevolent man, giving his legal services freely in the interests of justice to the oppressed who were not able to pay. Benevolent of his services to the community in many ways. For instance: In making a number of trips to the City of Washington for the purpose of securing concessions of lands to the whites from the Indians, this work sometimes requiring his stay in the City of Washington for months at a time without compensation and at a loss of retainers at home. Aside from this, he gave freely of his means, unostentatiously, not letting his "left hand know what his right hand was doing."

A humorous man, with a fund of anecdote, he was the life of every gathering of which he was a member. The humorous side of a situation appealed to him and his manner of relating an incident made even simple matters attractive. His wit was keen, without the sting that sometimes accompanies wit.

An able and successful lawyer, he was well grounded in legal principles—an indispensable asset of the lawyer. His practice on the frontier required attendance at terms of court widely separated and he traveled the circuit and tried cases where the statutes of the state were the only law books to be found. This dearth of authorities had its merits as it taught the lawyer to rely upon legal principles and reason from that foundation rather than rely upon legal precedents. The immense libraries at our command today do not, in my judgment, conduce to the making of able lawyers. Courts are too apt to require cases in point and not arguments based solely upon legal principles. The one has the tendency of making broad and comprehensive lawyers; the other of making the more technical lawyer.

He was at his best in the trial of cases and could select a jury better than any other man I have ever known. Jurors of equal intelligence and honesty arrive at different conclusions upon the same evidence, the result depending largely upon the nationality, the environment under which their lives have been spent, and many like matters. Wilson knew this and applied it in his practice with rare prescience. His acquaintance, his knowledge of men, his understanding of the motives which influence jurors, his oratory, won verdicts from juries where others would have failed.

An upright, able and conscientious judge, quick to see the right and to brush aside technicality, while his diction is excelled by few. His opinions are to be found from Volume 9 to Volume 18, inclusive, of the Reports of the Courts of Appeal.

Above all he was a family man. His first consideration was always for his family, and no sacrifice was too great for him to make to advance their welfare.

Judge Wilson was all that I have described and more. All honor to the memory of such a man. We ask that the resolutions be spread upon the records of this Court as a mark of respect for his memory.

Judge Bell responded for the Court, as follows:

I moved into Del Norte, the county seat of Rio Grande County, Colorado, April 13th, 1874, and found Judge Adair Wilson there, the leader of the bar, and dividing his time between his legal duties and newspaper work; and from this time till his death, I was closely associated with him, personally, professionally and politically.

Adair Wilson, THE MAN, is the shining mark among his diversified attributes and accomplishments. His nature was an embodiment of a sterling honesty, good mental capacity, and a humane sympathy of the open book form, which drew his fellows close to him at sight. He was that manner of man, that the neighboring children approached with a reverential bow of the head. The reveling boys never played "tick tack" on his window pane or unhinged his gate at Hallowe'en. They said: "This is Adair Wilson's place. He is a good friend of all the boys, and we will pass him by." He was diplomatical in all of his tendencies, and, by nature, ethical in all walks of life. Early in my acquaintance with him, I heard different members of the bar in his presence severely criticize the conduct of a brother member of the profession as not being ethical. He remained a silent listener. Ultimately, one of the enthusiastic critics asked his opinion as to the propriety of the professional brother's conduct. Judge Wilson quietly but firmly replied: "The deponent sayeth not." The rebuke was so severe that it was never effaced from my memory. Afterward, when my children showed a tendency to criticize their playfellows, I related Judge Wilson's rebuke as in close keeping with the injunction of the Holy One to "Judge not, that you be not judged."

Judge Adair Wilson possessed a mind with diversified tendencies. It could not be overspecialized or concentrated on one line of thought or be made a slave to a profession. He longed to be a child of the world at large. He enjoyed himself as much with the miner, the farmer, the stage-driver, or the town expressman, as he did with the judge, lawyer or statesman; hence he was equally admired and trusted by all classes. He possessed the cardinal virtues of a well-balanced and dependable American citizen in a marked degree, and, yet, he was not altogether free of some of the minor human weaknesses. His sterling qualities, wide information, loyalty to home and country made him subject to many calls for unremunerated services for the people at large. He was not mercenary in his tendencies; he never shirked a public or private duty; never betrayed a trust, or hesitated to sacrifice his private interest for the public weal. As a lawyer, he never brow-beat a witness, abused an adversary, deceived a judge or neglected a client. Could such an exemplary private and professional character fail to make a just and upright judge? His decisions are all seasoned with the spirit of natural justice. He despised harassing technicalities and brushed them aside as chaff in the interest of the natural rights of men. He was such an one that his good deeds in private and public life live and will live long after his body has returned to mother dust. Such lofty characters should ever be presented in song and story, for use in the nursery, the school and workshop as shining marks worthy of emulation by those of all future generations.

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ERRATA.

Page 55, line 9 from top, for "774." read "174."

Page 146, line 11 from top, for "Everbille," read "Eberville."

Page 483, line 7 of syllabus, for "in that," read "and that."

Page 498, line 12 from bottom, for "decission," read "discussion."

Page 561, line 2 from top, for "Here," read "There."

REPORTS

OF THE

DECISIONS OF THE

COURT OF APPEALS

OF THE

STATE OF COLORADO

April Term, 1914

[No. 3931.]

Larimer and Weld Irrigation Co. v. Landers.

1. Damages—*Land Destroyed by Seepage—Future Crops.* One who contends that his land was rendered utterly valueless by seepage, and demands as damages its full value, is not to be allowed for the loss of crops planted thereon in years subsequent to his having knowledge of this ruined condition. (5)

2. —— *Duty of Plaintiff to Minimize His Injury.* Plaintiff was aware in 1907 that his land was entirely ruined by seepage. Held, he was not to be allowed for the loss of crops planted in subsequent years. (6)

3. New Trial—*Verdict Against Evidence.* Plaintiff contending that his land had been entirely ruined by seepage from defendant's ditch was allowed the full value thereof. But there was evidence that in every year since such alleged injury he had planted it, and had, in some years, secured crops of some value; and was intending to continue to cultivate and plant it in the future. A new trial was ordered. (7)

4. Torts—*Redress by Act of Parties.* No one may lawfully construct his flume across the way of another's ditch, without consent of the other, and if he does so the owner of the ditch may remove it. (8)

Error to Weld District Court. Hon. H. P. Gamble, Judge.

MR. L. R. RHODES and MR. N. C. FARNSWORTH for plaintiff in error.

MR. R. G. STRONG for defendant in error.

HURLBUT, J., rendered the opinion of the Court.

This was an action instituted June 9, 1910, by defendant in error (plaintiff below) against plaintiff in error, to recover the value of three and one-half acres of land claimed to have been destroyed by seepage, and for loss of crops thereafter planted.

There are six causes of action set out in the complaint, the first alleging total destruction of the land, and demanding $700 damages for its value; the second, loss of crops on the same land for the year 1907, of the value of $100; the third, loss of crops thereon during the year 1908, of the value of $100; the fourth, loss of crops on the same land for the year 1909, of the value of $200; the fifth, loss of crops during the year 1909 on a different tract of land, of the value of $100, caused by defendant tearing out the flume which belonged to plaintiff. The sixth need not be mentioned, as the jury found in favor of defendant as to that. The jury returned a verdict for plaintiff in the sum of $1,050, upon which judgment was rendered.

At the trial plaintiff insisted upon a verdict for the full value of the three and one-half acres, at $200 per acre. The highest price placed on the land by any witness was $700, or $200 per acre, although there was some testimony that it was only worth $50 per acre or thereabouts. Eight interrogatories were specially propounded to the jury, all of which were answered. Under the first and second, the jury found for plaintiff for the full value of the land, in the sum of $700; under the third and fourth, they found for plaintiff in the sum of $70 for damages suffered by him in the loss of crops on the same land during the year 1907; under the fifth, they found for plaintiff in the sum of $80 for loss of crops on the

same land during the year 1908; under the sixth, they found for plaintiff in the sum of $100 for loss of crops on the same land during the year 1909; under the seventh they found for defendant; under the eighth they found for plaintiff in the sum of $100 for loss of crops for the year 1909 upon land other than the three and one-half acres.

It is alleged that during the irrigating seasons of 1907-8-9 the three and one-half acres became spoiled for farming purposes and were destroyed. As to this the testimony of plaintiff himself shows that in 1907 he considered the three and one-half acres ruined, destroyed, and of no value for any purpose whatever by reason of the seepage of water from defendant's ditch, and the alkalying of the land caused by said seepage. The following is extracted from his testimony:

Direct examination.

"Q. Tell the jury what happened in 1907, in your own way, as to any of your land being drowned out by this water, if such is the case, seeping through the bank, and tell the jury where it is. A. You could not turn water in there to run it out * * * this having been seeped up before, and being wet it stood there and failed to disappear, and consequently drowned out a very fine stand of alfalfa on about three and a half acres of ground. * * *

"Q. And this same condition that you have spoken about having drowned out the alfalfa in 1907, continued through 1908 and 1909? A. Yes, sir.

"Q. And, therefore, did it damage any of your land permanently? A. Yes, sir, ruined the land. It is so seeped we can't grow anything on it.

"Q. Is it worthless for farming land? A. Yes, sir.

"Q. Is it valuable for anything else? A. No, sir.

"Q. Does it have any value for market purposes? A. No, sir. * * *

"Q. In 1908, what, if anything, did you have planted on the same ground? A. We plowed it up and put it in barley.

"Q. Was it a good stand? A. Yes, sir. * * *

"Q. What became of your crop of barley? A. It gradually got wet all over the field in there.

"Q. How much land? A. About three acres and a half, and the little rushes grew up and the barley got that high (illustrating) and we got about twelve bushel of barley. * * *

"Q. You say you got about twelve bushels? A. Yes, sir.

"Q. And testing fifty-four pounds? A. Yes, sir.

"Q. It would amount to 648 pounds? A. Something like that. * * *

"Q. Worth $1.25? A. Yes, sir.

"Q. Or eight dollars and ten cents? A. Yes, sir."

Cross-examination.

"Q. You claim in 1907 your land was destroyed? A. Yes, sir, practically destroyed.

"Q. And you charge seven hundred dollars for the land? A. Yes, sir. * * *

"Q. So that piece of land, if you get all you ask, will bring you in two hundred per acre for its loss in 1907 and four hundred for the use of it since that time? A. Yes, that is about what.

"Q. What have you done with the land in 1911? A. Why, we have done the best we could with it, farmed it and tried to go on as we could.

"Q. That is this year? A. Yes, sir, we have got it sowed to wheat this year.

"Q. Got a good stand? A. Yes, sir, fairly. * * *

"Q. So you have continued to farm the three acres all along? A. Yes, sir, and we expect to as long as we can.

"Q. And you have got a prospect of a good yield on it this year? A. Yes, sir, it looks pretty good, but it is very dry this year and was last year. There is no water in the ditch, practically, only one day it come above the level of the land this year."

In the light of this testimony we are not impressed with the force of plaintiff's contention that he did not know until the latter part of 1909 that, as he now claims, the land was totally destroyed for farming, and all other purposes; or that its value has been totally destroyed. His testimony above quoted and such contention appear to be entirely inconsistent, and in conflict. If he became aware in 1907, as some of his testimony seems to show, that the seepage and alkalying complained of had entirely destroyed his land for farming and all other purposes, and at the trial insisted upon and succeeded in recovering a judgment for the full value thereof, at the highest price placed upon it by any of the witnesses, it does not appear just or reasonable that he should ask for and be permitted to recover for the loss of crops placed thereon during the year 1907, and the two succeeding years. We think his position in respect to such damage is somewhat analogous to that of an owner whose land has been condemned by statutory proceedings. In such case the owner cannot recover for subsequent damage or injury to the premises condemned.

In view of plaintiff's own testimony, it was error to give portions of instruction No. 10, which reads in part as follows:

"If the jury find and believe from the evidence in this case that the 3½ acres of plaintiff's land was completely destroyed in the year 1907, and that the plaintiff had reason to believe that no crops could thereafter be grown on said land, the plaintiff is not entitled to recover for the loss of crops subsequent to the year 1907.

Or if, on the other hand, the jury find and believe from the evidence that the plaintiff had no reason to believe or did not ascertain until the year 1909 that said land could not be farmed or a crop produced thereon, and you further believe from the evidence that the cause of such destruction of the land and the crops was the increased carriage of water in this ditch, or was caused by the negligent or careless operation of said ditch, *then the plaintiff is entitled to recover for the loss*

of crops for the three years sued for, in addition to the value of the land." (Italics ours.)

The italicized part of the instruction, under the evidence, ought not to have been given, for it is undisputed that the crops planted in 1907-8-9 were substantially total failures, and plaintiff, from his own testimony, had good reason to believe, and in fact knew, in 1907, that such would be the probable result. It cannot be the law that plaintiff, under such circumstances, could, after the year 1907, continue year after year expending money and labor in seeding and planting crops, and thus build up and create a liability of enormous proportions against defendant, and then, at his pleasure, bring an action to recover therefor, plus the full market value of the land.

Our attention has not been called by counsel to any case, nor do we know of any, where, under conditions similar to those found here, one has been permitted to recover for the full market value of land permanently destroyed, and also for loss of crops subsequently planted thereon. Counsel, however, have cited a number of cases permitting recovery for *partial* destruction of land, and at the same time for damages to crops subsequently planted on the same.

From Farnham, Waters & Water Rights, Vol. 2, page 1876, wherein the author discusses the rule for estimating damages for injury to land by water, we quote the following: "The full value of the property cannot be allowed where the owner is not deprived of its use," citing *Bailey v. Heintz*, 71 Ill. App. 189. The case cited is short, and is in some respects similar to the one at bar. The action was brought to recover for injury to plaintiff's land caused by defendant's diversion of waters from their naturel channels, so as to overflow plaintiff's premises. Plaintiff recovered the full value of the land injured. The court said in part:

"Trial by jury; verdict for plaintiff $2,000, and judgment thereon. * * *

"The entire value of the plaintiff's property was from $1,500 to $2,000, according to his proof. The overflow com-

plained of was for the two seasons preceding the trial, and the loss of the crops of fruit, etc., did not exceed two or three hundred dollars per annum. In view of the size of the tract, three acres, of which two were devoted to corn and other such crops, and of the character of the improvements, this estimate of damage must be considered very high. * * *

"The assessment here was for the full value of the property. Even if prospective damages were allowable, such a figure would be unreasonable and exorbitant, as the plaintiff has not been deprived of the whole property, and will not be in any event. * * * In no view of the case, as shown by the present record, can the legal damages be as great, or approximately so, as allowed by the verdict."

We may well apply in the instant case what was there said, that "the plaintiff has not been deprived of the whole property, and will not be in any event." Notwithstanding the statement of plaintiff that his land was totally destroyed for all future time for any purpose whatever, the record is full of testimony, given by himself and his witnesses, to the effect that, subsequent to 1907, crops of some value were raised on the premises, that there was a fair crop thereon at the time of trial, 1911, and that plaintiff intended to continue to plant crops in the future upon the same land. It does not appear to us credible that patented agricultural land is of no value whatever, and never will be, because of its flooding for a limited period.

As we read the record, we are convinced that the jury, after rendering a verdict in favor of plaintiff for the highest market value of the land, was not warranted in allowing him in addition, damages for the loss of crops planted during the years 1907-8-9. Under this record the judgment should not be sustained for anything more than the full market value of the land in question.

As to the $100 allowed by the jury for loss of crops on the land other than the three and one-half acres, which was

caused by defendant tearing out the flume placed across its ditch and right of way by plaintiff, we do not think the record sufficiently shows right or authority in plaintiff to construct his flume on or over defendant's right of way. The evidence shows that the flume was torn out several times by defendant, which indicates that it was placed there without license and against the latter's wish and consent. True, as suggested, a right of way may be obtained over lands possessed by another, for purposes of irrigation, etc., but an orderly and peaceful procedure is provided by law to secure such right, in case consent cannot be had. The law does not recognize a right of one to go upon land in peaceful possession of another, without the latter's consent and against his wishes, and build a structure thereon. Such a rule would tend to legalize force and violence, and tend to invite a breach of the peace. An entry in such case must be made under proper judicial authority.

If defendant in error will remit from the judgment below all sums in excess of $700, the judgment will be affirmed for the latter amount, with interest from July 25, 1911, costs to be equally divided between the parties; if not, the judgment will be reversed and case remanded.

Judgment affirmed conditionally.

CUNNINGHAM, P. J., dissents.

[No. 3717.]

GOUGAR, *et al.*, v. BUFFALO SPECIALTY COMPANY.

On Re-Hearing.

1. PLEADINGS—*Amendments—Liberality to be Exercised.* Courts should be very liberal in allowing amendments to answers. A new defense may be admitted as an amendment. (14)

Defendants had executed an agreement admitting the validity of certain patents for an invention, claimed by the assignor of plaintiff, and past infringements thereof, covenanting not to infringe the same in future, and in case of such future infringement, to pay $500 as liquidated damages for such past infringements. Action to recover the $500.00.

Defendant was permitted to put in a supplemental answer to the effect that the agreement was entered into on the faith of plaintiffs' representation that the patents were valid, etc., whereas defendant had since ascertained that they were without validity, and that plaintiff had no valid patent or monopoly. (13, 14)

2. *Motion to strike.* Waives all grounds not alleged. (14)

3. BILL OF EXCEPTIONS—*When Necessary.* The court of review may, in furtherance of justice, give relief against an error of the court below, even though no exception is reserved. (14)

4. APPEALS—*Errors Not Assigned,* may be considered and corrected when justice requires. (14)

5. PATENT FOR INVENTION—*Validity—Jurisdiction of the State Courts.* The courts of the state may try the validity of a patent for an invention. (13)

6. CONTRACTS—*Penalty or Liquidated Damages.* Whether a sum named in a contract is liquidated damages or a penalty depends, not merely upon the words used, but the nature of the contract, the situation of the parties, and the attending circumstances. (15)

In general, where the stipulation is to pay a sum in gross for the non-performance of an agreement, the sum will be regarded as a penalty. So where the strict enforcement of the contract will work oppression. So if a gross sum is to be paid in case of the breach of any one of several covenants of different degrees of importance. (15-19)

Defendants had been manufacturing and selling a compound for closing punctures in pneumatic tires. They executed a writing admitting the validity of certain patents held or claimed by the assignor of plaintiff, conferring the exclusive right, etc., admitting the infringement thereof in the past, and covenanting not to further infringe, etc., and in case of the violation of this covenant to pay, "as liquidated damages, not as a penalty," the sum of $500 for the past infringements. Action to recover the $500.00. There was no attempt on the part of the plaintiff to show what sales of the infringing substance had been made by defendants prior to the date of the contract, and the instrument referring to the damages occasioned by the infringement as only "considerable;" *held*, that the manifest purpose of the agreement was to coerce respect for the patents, and for this reason, and because, literally interpreted, the defendants would be liable in the full sum of $500 for an infringement, involving only nominal damages to the other party, the $500 must be regarded as a penalty.

7. EVIDENCE—*Opinions.* A witness testified that in his opinion the damage sustained by the owner of a particular patent, by reason of the infringement thereof were impossible of computation. *Held* mere conjecture and of no legal efficacy. (17)

Appeal from Denver District Court. HON. HUBERT L. SHATTUCK, Judge.

MR. R. D. THOMPSON for appellants.

MR. E. G. MANSFIELD, MR. WM. P. KAVANAGH and MR. JOHN HORNE CHILES for appellee.

On Rehearing.

BELL, J.

This action was brought in the Denver District Court on a written contract, which provides that The Buffalo Specialty Manufacturing Company, assignor of The Buffalo Specialty Company, appellee herein, "is now and for some years past has been the owner of letters patent of the United States of America No. 578551, issued on the 9th day of March, 1897, to Charles E. Duryea and his assignee The Indiana Rubber and Insulated Wire Company, of Marion, Indiana, which letters patent secure to said party of the first part (The Buffalo Specialty Manufacturing Company) the full, complete and exclusive right to *manufacture, use and sell all liquids, semi-liquids, powders or compounds for the purpose of automatically healing or closing punctures in pneumatic tires, and articles,* and

"Whereas, the said parties of the second part (appellants) are now and have been for some time past carrying on and conducting a certain bicycle and automobile business in the city of Denver, and have also been manufacturing and selling certain tire compounds or mixtures known as 'Elastic Tire Restorer' and 'Elastic Solution,' which articles come in competition with the article manufactured and sold by said first party *under said, and other patents for the same purposes*, thus causing to said first party *considerable damage*, and

"Whereas, said first party is about to commence suit against said second parties to restrain such infringement, and also to recover said damages, NOW, THEREFORE, for and in consideration that said first party shall not bring said suit, and in the further consideration of one dollar ($1.00) to them in hand paid by said first party, the receipt of which is hereby acknowledged, said second parties individually and as co-partners do hereby covenant and agree to and with said first party as follows:

"1. That the said letters patent and all other letters patent now owned by said first party or in which it has an interest, covering the manufacture, use or sale of any fluid, semi-fluid, powder, or compound, for automatically healing or closing punctures in pneumatic tires, are good and valid patents, and that said second parties will not hereafter, directly or indirectly question either the validity of said patents, or the exclusive right of said first party to manufacture, use, and sell, any and all liquids, semi-liquids, powders, or compounds for such use.

"2. That said second parties will on and after the date hereof cease the manufacture, use or sale of any and all fluids, semi-fluids, powders or compounds, or preparations whatsoever, to be used for automatically healing or closing punctures or vents in pneumatic tires or articles, and that they will not hereafter during the life of said patents or either of them, individually or as co-partners, make, use or sell, or offer for sale, or be interested directly or indirectly in the manufacture, use or sale of any fluid, semi-fluid, powder, compound or mixture for automatically healing or closing punctures or vents in pneumatic tires for vehicles. Except, however, that said second parties have at all times the right to use any and all such articles for such purposes manufactured by the party of the first part.

"3. That if said second parties or either of them shall in any way violate this agreement on their part at any time during the life of said patents, or either of them, that then and in that event they shall pay to the party of the first part as liquidated damages and not as a penalty the sum of five hundred dollars ($500), which amount may be recovered in an action at law hereon, and which amount, when so recovered will be in full for all damages sustained by said party on account of the said second party infringing said letters patent prior to the date hereof, but not for damages so suffered subsequent to said date.

"4. That in the event said second parties shall keep and perform on their part all and singular the conditions hereof the said first party does hereby waive all right and claim to damages heretofore suffered by reason of said second party's having infringed said patents." (Italics are mine.)

It is charged in the complaint that appellants neglected and refused to comply with the terms of the contract, and have not ceased the manufacture, use and sale of fluids, semi-fluids, powders, compounds, and preparations for automatically healing and closing punctures and vents in pneumatic tires and articles, and that they and each of them have made, used, sold and offered for sale, and have been interested, both directly and indirectly, in the manufacture, use and sale of fluids, semi-fluids, powders, compounds, and mixtures for automatically healing and closing punctures and vents in pneumatic tires and articles; and that, by reason of such breaches of said written contracts, said appellants owe the appellee the sum of $500, as liquidated damages.

Appellants answered denying the charges above stated, and on February 26th, 1910, the trial court granted leave to appellants to file a supplemental answer. The supplemental answer filed is designated as a "supplemental and additional answer," and alleges, in substance, that on or about July 28th, 1903, an agent of The Buffalo Specialty Manufacturing Company informed appellants that said company was then the owner of letters patent of the United States, No. 578,551, which gave said company the exclusive right to manufacture and sell any solution or substance for the healing or mending of pneumatic tires; that said agent declared and threatened that, if appellants did not cease using any and all solutions and compounds for healing of pneumatic tires, said company would prosecute them in the United States courts, would put them to great expense and litigation, and would destroy their business; that appellants relied upon the truthfulness of the claims made by said agent, and, fearing that the threat would be executed, they signed the contract as above set forth, but,

within a year thereafter, had learned that said company had no valid patent for, or monopoly on, the manufacture, sale or use of any solution or substance known as "Never-leak," or any other solution or substance whatever, for the healing of pneumatic tires; that the contract signed by them was wholly without consideration, and was entered into under the belief that said company (which subsequently assigned said contract to the appellee herein) had such a patent as would prevent appellants from manufacturing a certain solution that they had theretofore manufactured known as "The Elastic Tire Restorer."

On March 5th, 1910, appellee filed what it denominated "a motion to strike," but which, in substance, seems to have been a demurrer, charging that said supplemental and additional answer was irrelevant because:

"(1st) Said supplemental answer presents issues which cannot be determined by this court.

"2nd Said supplemental answer presents issues which constitute a new and independent defense from those presented by the issues in said defendants' original answers."

For the causes thus assigned, the trial court seems to have peremptorily stricken the supplemental answer from the files. We are utterly unable to see wherein such an answer would or could have raised such an issue as could not have been determined by the trial court; or wherein it could have been irrelevant by presenting an additional defense; and we find nothing in the record that justifies the striking of it from the files. It seems to have been the purpose of the appellants in filing it to be in a position to take advantage of the defense therein presented; and it is suggested in the argument of the appellee that it was properly stricken out because no sufficient showing was made that the facts therein alleged were not known when the original answer was filed. This suggestion might have some force if it had been contained in the motion to strike; but the point was not raised in the trial court, which, we think, erred in its ruling based

upon the objections made, both of which are untenable; and all others have been waived, not having been timely urged. Courts should be very liberal in allowing amendments to answers in the interest of justice, and such liberality may well be extended to the admission of new defenses. *Cartwright v. Ruffin*, 43 Colo. 377-379.

We are unable to find wherein an exception is preserved to the sustaining of this motion to strike, unless we should consider the motion as a demurrer, in which case an exception to the overruling thereof, unless waived, saves itself. But, even if no exception is preserved or no assignment of error or argument is made against the court's ruling in the matter, we may refuse to consider the same, but, in the interest of justice, are not prohibited therefrom.

Much evidence was offered and admitted at the trial which might support such a defense as was set forth in the supplemental answer, but whether it was sufficient for this purpose we should not and do not decide, as the case may be retried. But as the pleadings stand now, with the supplemental and additional answer eliminated, we should say that appellants have no *allegata* upon which to base any evidence in support of such a defense as is presented in said answer. This forcibly demonstrates the importance of the rule of pleading recognizing a great liberality in permitting defendants to amend their pleadings, even to the extent of setting up new defenses, as the same does not change the cause of action of the plaintiff, and for the additional reason that the defendant has not the privilege of suffering a non-suit, and of having a subsequent day in court as the plaintiff may have. Bliss on Code Pleading, 3rd Ed., Sec. 430; *Cartwright v. Ruffin, supra.*

It is, therefore, hereby directed that, in case of a retrial, the defendants be permitted to amend their pleadings in conformity with this opinion so that justice may be accomplished.

The trial court, in construing the contract, held that the provision thereof for the payment of the sum of $500 upon a breach of any of the conditions therein contained was one for the payment of liquidated damages and not for the payment of a penalty, and its ruling in this respect is assigned as error.

Whether a sum named in a contract is to be regarded as liquidated damages or as a penalty depends upon the intention of the parties as it appears from the nature of the contract, the situation of the parties and the attending circumstances, and not merely upon the language used: *Carson v. Arvantes,* 10 Colo. App. 382, 385-6; *Sanford v. First Nat. Bk.,* 94 Ia. 680; 19 Am. & Eng. Encyc. of Law, p. 396; 13 Cyc., 92-3; 2 Page on Contracts, Secs. 1172-3; and in case of doubt, whether a sum fixed by contract is a penalty or liquidated damages, the courts lean toward the former construction: *The Amanda G. M. Co. v. People's M. Co.,* 28 Colo. 251; *Monmouth Park Ass'n. v. Wallis Iron Works,* 55 N. J. Law, 132, 39 Am. St. Rep. 626; 3 Parsons on Contracts, 9th Ed., p. 171; 2 Page on Contracts, Sec. 1173.

In the case of *Radloff v. Haase,* 196 Ill 365, 368-9, the plaintiff bought of the defendant his bakery business for the sum of $1,400, and the defendant bound himself in the sum of $2,000, to be paid to the plaintiff, if he, the defendant, should engage in the same business within a radius of five blocks, for a period of five years. The principal question presented for consideration was whether the plaintiff had the right to recover the full amount of $2,000 as liquidated damages, or only the actual damages sustained. The Supreme Court, in passing upon the question, said:

"Whether the term 'liquidated damages' is used or not, the idea of the courts is to ascertain, if possible, the actual damages sustained, and if it is possible to ascertain the actual damages, or if the amount of liquidated damages mentioned in the contract is exorbitant, the court will construe the amount as a penalty, rather than as liquidated damages. It

is said in the *Scofield case, supra,* (95 Ill. 190) that the phrase 'liquidated damages' has often been made to read 'penalty' if the strict construction of the phraseology would work oppression upon the obligor; or, if the enforcement of the contract would be unconscionable, the courts will then construe the amount named in the contract as a penalty. And it seems from all cases that, whatever may be the wording of the contract, the courts will admit evidence as to whether or not the strict enforcement of its provisions would work a hardship upon the obligor. In the case at bar * * *, if the contract could be construed as providing for liquidated damages, then, had appellee begun business but one day before the expiration of the stated terms, he would have been liable to appellant for the full $2,000."

Where parties agree upon the damages to be paid for a breach of contract, whatever name they give to it, they do substantially the same thing which is done by a bond with a penalty, and there is no more reason why the courts should regard the agreement, if it opposes reason and justice, in the one case than in the other. 3 Parsons on Contracts, 9th Ed., pp. 171-2.

In *Davis v. Gillett,* 52 N. H. 126, 129-30, it is said, in part quoting with approval from *Tayloe v. Sandiford,* 7 Wheat. 13:

"If the agreement assumes the form of a bond, with condition that it shall be void upon the performance or non-performance of an act, the *prima facie* presumption is, that the sum of money mentioned therein is intended merely as a security and not as liquidated damages; and this presumption will stand until controlled by very strong considerations. * * * . 'In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liqui-

dated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties."

The instrument under consideration in the instant case, or that part of it providing for the payment of $500, is in the very nature of a penal bond, and seemingly intended to coerce performance on the part of the appellants of the conditions therein imposed, rather than to compensate the appellee for any damages that it would suffer by reason of the non-performance thereof; but it is contended that the designation in the instrument of the sum of $500 as liquidated damages overcomes the *prima facie* presumption that the amount named was intended as a penalty; and appellee attempted to support its contention by trying to prove that the nature of the business was such that a computation of the actual damages sustained was impossible. To this effect, one of its witnesses, who was also one of its attorneys, was asked:

"Do you know, Mr. Mansfield, approximately, as to what amount or how much damage The Buffalo Specialty Co. has sustained?

"No, sir, I have not. I think it would be impossible of computation, because of the nature of the business."

The first sentence of this answer discloses a complete lack of knowledge of the matter solicited; the second sentence thereof is a mere conclusion or voluntary opinion of the witness which serves no legal purpose in the case.

Appellee also called as a witness George L. Gougar, one of the appellants, who was examined under the statute and testified that every sale of Elastic Tire Restorer made by the appellants between the date of the contract and the commencement of the action appeared upon their books, and that he could show therefrom every such sale, "but not very quickly;" and that they never had any interest in the manufacture of Elastic Solution, but had sold a very limited quantity thereof in 1907 or 1908. There was no endeavor whatever by appellee to show any sales made prior to the date of

the contract, the damages for which the sum of $500 was intended to cover or secure, and the only reference made to the amount of damages sustained prior to the date of the contract, and which it alone purports to cover, is contained in the contract to the effect that, by reason of the manufacture, sale and use of Elastic Tire Restorer and Elastic Solution, which articles come in competition with articles manufactured and sold by appellee under its patent, the appellee has sustained "considerable damage." "Considerable" is defined by Webster in his first definition of the word as "worthy of consideration; requiring to be observed, borne in mind, or attended to," and, therefore, under the ordinary construction of pleadings, this vague term may well apply to any sum that rises above the dignity of a trifle, and certainly no defendant should be mulcted in the sum of $500 damages on any such uncertain allegation, wholly unsupported by proof.

Page on Contracts, Vol. II, Sec. 1167, defines a contract for a penalty and one for liquidated damages, as follows:

"A contract for a penalty is an agreement to pay a stipulated sum in case of default, intended to coerce performance, to punish default, or to secure payment of the actual damages. A contract for liquidated damages is a contract by which the parties *in advance of breach* fix the amount of damages which will result therefrom, and agreed upon its payment," (italics are mine) citing in support of each definition, respectively: *United States v. Cutajar*, 67 Fed. 530; *Gillilan v. Rollins*, 41 Neb. 540, 59 N. W. 893; and *Monmouth Park Ass'n v. Iron Works, supra*, 55 N. J. L. 132, 39 Am. St. Rep. 626, *sub nomine Wallis Iron Works v. Park Ass'n.*, 19 L. R. A. 456, 26 Atl. 140.

It will be borne in mind that the amount sought to be recovered consists of damages which accrued previous to the execution of the contract, and the parties could not have been trying to agree upon a sum certain as liquidated damages to cover the results of a future breach, the damages for which could not be foretold. If the appellants could definitely show

every sale and the approximate amounts used by them, as testified to by George Gougar, from the date of the contract to the time of the commencement of the suit, we may well infer that they could have shown the like sale and use for the indefinite time set forth in the complaint prior to the date of the sale. The appellee having failed to make any showing in this respect, we may well conclude that the contract was entered into by it, not for the purpose of securing compensation for the damages sustained, but to coerce performance of the conditions therein imposed. Where the agreement is made for the attainment of another object or purpose, to which the stipulated sum is wholly collateral, as would seem to have been done in this case, such sum will be treated as a penalty: 13 Cyc., p. 93.

Another test to which the courts frequently resort as an aid in distinguishing between a penalty and liquidated damages is stated, Page on Contracts, Vol. II, Sec. 1177, as follows:

"If provision is made for breach of several different covenants of a contract, and a gross sum is fixed which is to be paid in case of the breach of any one of such covenants, and the covenants are of different degrees of importance so that the damages resulting from the breach of one would be much greater than those resulting from the breach of another, the stipulation is held to be a penalty."

This principle is strongly supported in an extensive note to *Graham v. Bickham*, 1 Am. Dec. 328, citing many American and English authorities.

In *Floding v. Floding*, 73 S. E. (Ga.) 731, George A. Floding sold his business to W. E. Floding, and, in addition to the payment of the purchase price, W. E. Floding took a penal bond in the sum of $5,000, mentioned as liquidated damages, to be paid to him if George A. Floding violated the agreement. Among other provisions of the agreement, George A. Floding bound himself not to again engage in the manufacture or sale of regalia within five years from the date

of the agreement. The Supreme Court of Georgia held, as stated in paragraph 3 of the syllabus prepared by the court itself, that:

"Where a contract contains several stipulations, and the sum named in the contract as 'liquidated damages' for a breach of the agreement can apply to the breach of any stipulation of the contract, and it is apparent that the damages which could result from the breach of some of the stipulations would be so small in comparison with the sum named as liquidated damages as to make the latter excessive and unjust, the amount of damages stipulated will be held to be in the nature of a penalty, and not 'liquidated damages.'"

Under the contract before us, if enforced as it reads, the appellants would be liable to the full payment of the sum of $500 if they or either of them should manufacture, use, sell or offer for sale, any or all of the prohibited articles; or they would be liable to the same payment if they should strictly observe the conditions of the contract in this respect, and either question the validity of any of the alleged patents of the appellee, or successfully contest them. A breach of a number of the conditions could not involve an injury to the appellee in excess of nominal damages, while a breach of other conditions might occasion it very large actual damages.

The appellants introduced in evidence the patent claimed to have been infringed, seemingly for the purpose of showing that the compounds made by them did not fall within the terms thereof, and that the effects produced were substantially different, and there appears to be a great variance between the recitals in the contract and the descriptions of the compounds or processes set forth in the patent. In fact, in the application for the patent, the patentee showed no intention of patenting a compound, but simply a process of using any free-flowing liquid, semi-liquid, or powder for automatically healing tires, and asserted therein that:

"Among the liquids, gums or compounds which have been used with greater or less success, experimentally, by me

I will mention thin liquid glue or thick mucilage combined with sufficient glycerine to insure said glue or mucilage remaining fluid when exposed to the air contained within the tire."

He further stated that he had also successfully closed leaks or punctures by means of his invention by the use of flour within the air tube, the same being normally dry, but converted into a paste when needed by injecting into the air tube a small quantity of water, and that he did not confine himself to any specific liquid, compound or substance, "since the principle of my invention remains the same, irrespective of the particular substance found to be best suited to the stated requirements—namely, a liquid or semi-liquid which will retain its free-flowing characteristics while contained within the tire, but which will preferably harden or become more dense when exposed to the outer atmosphere."

The variance between the statements in the contract and application for and letters patent, and the evidence tending to show that the solutions used by the appellants were not used for the same purposes or in the same manner as those authorized under the patent, might have been very important had the appellants been able to retain intact their amended and additional answer. If said answer had not been stricken from the files, the contract sued on might have been proven to be void by reason of the alleged misrepresentations relied upon by the appellants when they executed and delivered said contract.

The contention of appellants so persistently pressed, that the contract is void as being in restraint of trade and broader than necessary for the reasonable protection of the rights of the patentee, is strongly supported by reason and authority; but the court has met with so many complications by reason of defective pleadings, incomplete records and omissions to preserve rights available to appellants at the trial, and the sweeping admissions in the contract, that the appellee owned the right to the exclusive use, manufacture and sale of prac-

tically all liquids, semi-liquids and compounds which may be used for automatically healing penumatic tires or articles, that it feels that the best course is to permit the case to be fully developed by the pleadings; and, because of the errors appearing in the record and the complications suggested, the judgment is reversed and the case remanded for further proceedings as herein indicated.

Reversed and Remanded.

CUNNINGHAM, Presiding Judge, specially concurring:

I can not concur in the view expressed in the majority opinion that the sum named in the agreement was a penalty rather than liquidated damages. I am not in sympathy with the tendency of the courts to relieve parties from their solemn contracts by judicial construction of the same. In the instant case the parties, in language as simple and plain as it was possible to employ, stated that the damages named in the contract should be regarded as liquidated damages, and, in order to make thoroughly positive their intention in this respect, they explicitly affirmed that the sum should *not* be taken or construed as a penalty. No attempt was made on the trial to show that the parties did not understand that the $500 should be treated as liquidated damages, and the situation presented by the facts surrounding the contract is one where the damages ought to be regarded as liquidated, first, because of the difficulty of proving them; second, because both parties contemplated the abandonment of a then contemplated law suit, one of the results of which could be foreseen, viz: the difficulty, if suit were started later, of assembling the evidence to prove the amount of damages provided for in the contract. My view is well expressed by the following language appearing in the 13th volume of Cyc., pages 90 to 94:

"As to whether a sum agreed to be paid as damages for the violation of an agreement shall be considered as liquidated damages or only as a penalty is held to depend upon the mean-

ing and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject-matter of the agreement. The contract is to govern; and the true question is, What was the contract? Whether it was folly or wisdom for the contracting parties thus to bind themselves is of no consequence if the intention is clear. If there be no fraud, circumvention, or illegality in the case the court is bound to enforce the agreement. * * * Where the parties have agreed on the amount of damages, ascertained by fair calculation and adjustment, and have expressed this agreement in clear and explicit terms, the amount so fixed will be treated as the true damages and not as a penalty. * * * Where the parties by the terms of their agreement have expressly provided in terms whether the damages shall be liquidated or unliquidated, they will be so construed by the court."

[No. 3824.]

WILLIAMS ET AL. v. SMITH.

BROKER—*Right to Commissions.* A broker employed by the owner of lands to find a purchaser therefor is not entitled to a commission unless he was the procuring cause of the sale. The evidence examined, and *held* that the broker, though he assisted in the sale was not the procuring cause thereof. (23)

Appeal from Routt District Court. HON. JOHN T. SHUMATE, Judge.

MR. PAUL KNOWLES, MR. WM. B. RHODDA and MR. WALTER E. WHITE for appellants.

MR. ARTHUR L. WESSELLS, for KALEY, intervenor.

MR. W. B. MCCLELLAND and MR. EDWARD C. STIMSON for appellee.

MORGAN, J.

Smith obtained a judgment in the Routt District Court for $600.00, in his action for a broker's commission, on a sale of real estate; trial without a jury. The law applicable to the facts as disclosed by the record demands a reversal.

In the case of *Saukey v. Cramer,* 24 Colo. App. 16, 131 Pac. 288, the court said:

"Where by the plaintiff's own testimony and by documentary testimony not susceptible of alteration or explanation, it appears that the plaintiff's case is without merit, a judgment in his favor will be reversed, and the court below directed to enter judgment for defendant."

In the case of *Babcock v. Merritt,* 1 Colo. App. 84, 27 Pac. 882, the court said:

"The decisions of the different courts are not all in harmony, but there are some well settled rules and legal principles that seem to be well founded in reason that are almost universally conceded as controlling. Two of them only need be invoked in the determination of this case. First, before the broker can be said to have earned his commission he must produce a purchaser who is ready, willing and able to purchase the property upon the terms, and at a price designated by the principal. * * * Second, the broker must be the efficient agent or procuring cause of the sale. The means employed by him and his efforts must result in the sale. He must find the purchaser and the sale must proceed from his efforts acting as broker."

In the case of *Root v. Barbour,* 51 Colo. 399, 118 Pac. 988, the court said:

"Before a broker is entitled to compensation for a sale of real estate, it must appear there is testimony tending to establish that by his efforts a sale was effected."

It is said in 19 Cyc. 257:

"The fact that the transaction which the broker was authorized to negotiate is finally consummated does not of itself entitle the broker to a commission; he must have been the procuring cause of the transaction, in the absence of some agree-

ment between him and the principal to the contrary, else no compensation is due. This is true, although the broker had negotiated with the person with whom the principal finally contracted; the fact that a broker finds a customer with whom the principal closes a contract without the broker's further aid does not give him a right to a commission, unless he was the procuring cause of the transaction. If, however, the transaction which the broker was authorized to negotiate is consummated as the direct and proximate result of his efforts, he is entitled to a commission, and this is true even though he may have had no personal intercourse with the person with whom the principal enters into the contract."

Stating the undisputed material facts chronologically:

About the first day of August, 1909, the defendant, Williams, owned a ranch in Routt county, Colorado, and had given two or three agents, including Smith, and the firm of Bivens and Wessells, authority to find a buyer. Soon afterward, Williams, Bivens and Wessells, and a Mr. Kaley, from Nebraska, began negotiations looking to a sale of the ranch, and about August 10, Williams, Bivens, Kaley and a friend of his from Nebraska went out and looked at the ranch; Kaley, being the prospective purchaser, liked the ranch and, on ascertining from these parties the price and terms of sale, expressed a willingness to buy it, if some one would take a half interest with him, saying he was not able to buy the whole of it. About the 19th of the same month Mr. Bennett and Mr. Spence, two old acquaintances of Kaley from Nebraska, arrived at Steamboat Springs, and on the same day saw Mr. Kaley who told them about the Williams ranch, giving them the price, $12,000.00, and terms of sale, Kaley saying that he would take a half interest in it, if he could get some one to take the other half. One or two days thereafter Bennett and Spence, hearing that Smith was a man who knew the country well and could show them ranches for sale, hunted him up and asked him to drive them out into the country, and both of them, as witnesses for Smith, testified that they asked him to take them to the Wil-

liams ranch. When they reached this ranch one of them requested Smith to telephone Williams, and to ask him to hold the ranch until they came back that evening. Smith testified that Williams stated to him at this time over the telephone that some parties were out there looking at the ranch that day, but that he would hold it until that evening. As they drove through the town on their return they saw Williams and a conversation occurred in which Williams was introduced and stated that he would take $12,000.00 for the ranch. Smith then told him that he had priced the ranch at $12,000.00, with the crops, and Williams said, "Whatever you said goes." Leaving Williams, they drove to the hotel where Kaley was stopping, where Spence introduced Smith, and all four had a conversation about the ranch, Kaley saying he had seen the ranch before, but nothing was agreed upon. Smith then drove home, leaving Bennett, Spence and Kaley at the hotel. The same evening after supper, Kaley and his friend from Nebraska, together with Bennett and Spence, met at the office of Bivens and Wessells, where the sale was completed. Smith, also, came, and testifies that he "quarreled with Wessels about the commission."

Under the foregoing authorities Smith was neither the moving cause of this sale nor the efficient agent in effecting it. The purchasers obtained all their information prior to seeing Smith, except looking at the ranch, and as they sought Smith for the purpose of having him drive them out to look at the ranch he was not even the procuring cause of their seeing it. The moving and procuring cause of this sale, and the efficient agency that brought it about, occurred before Smith was known in the transaction, and the sale was not the result of his efforts. The judgment of the lower court is therefore reversed with directions to enter judgment for the defendant, and for the intervenor.

Decided March 9th, A. D. 1914. Rehearing denied April 13th, A. D. 1914.

[No. 3807.]

MUGRAGE ET AL. V. THE PEOPLE.

COUNTY COMMISSIONERS—*Proceedings—Record.* A record is not always required to render the proceedings of the Board of County Commissioners binding. (29)

And where question arises as to their action a liberal discretion should be exercised in receiving evidence of the attending circumstances, to aid in ascertaining the real purpose of what is set down. (27)

The statute (Rev. Stat., secs. 1215, 1216) provides that the Board of County Commissioners shall at the time of the annual levy of taxes pass a resolution which shall appropriate such sum or sums as may be deemed necessary to defray all expenses and liabilities for the next fiscal year, and specify the objects and purposes for which appropriations are made, and the amount appropriated for each purpose; that no further appropriation shall be made at any other time within such fiscal year; and that neither the board nor any officer of the county shall add to the county expenditures anything over and above the amount provided for by such resolution.

The only resolution of the board which could be termed an appropriation, directed levies upon the taxable property, etc., as follows: "For State Purposes, 4 mills; for County Redemption Fund, 5 mills; for County General Revenue, 10 mills; for Road Fund, 4 mills; for General School Fund, 4 mills—the same to be extended on the tax roll by the county assessor, and by him certified to the county treasurer for collection." *Held* that warrants regularly issued for unquestioned obligations of the county, and paid by the treasurer were to be credited to him in his account, in spite of the absence of any formal appropriation resolution, such as required by the statute; that the treasurer was not to be penalized for the omissions of the governing body of the county. (29-32)

Appeal from Grand County District Court. HON. CHARLES MCCALL, Judge.

MR. W. F. ROBINSON, MR. P. J. E. ROBINSON, MR. DAVID P. HOWARD and MR. RALPH W. MCCRILLIS, for appellants.

MR. B. C. HILLIARD and MR. J. R. ALLPHIN for appellees.

BELL, J.

This action is founded on an alleged breach of a County Treasurer's bond erroneously executed to the County of Grand as obligee, instead of to The People of the State of Colorado, as the statute provides. The condition of the bond was in substance, as provided by the statute, for the faithful perform-

ance by James C. Mugrage, bounden treasurer, of the duties of his office, and for the payment of all moneys that might come into his hands as such treasurer, and for the delivery of all the books, records, papers and other things belonging to said office or to said County of Grand, to his successor in office. It is admitted by the appellees and by the trial judge, who directed the jury to return a verdict against the appellants for the sum of $2,093.42, that the appellant treasurer acted honestly, paid out nothing except upon warrants duly issued by the board of county commissioners for primary and necessary obligations of the county, barring the holding of the judge that there was not a valid appropriation resolution passed by the board of county commissioners during the last quarter of the fiscal year ending December 31st, 1908. It is contended by the appellants that, for the fiscal year 1909, the board of county commissioners passed a resolution in all essential particulars the same as had been passed and acted under for the 13 fiscal years previous thereto, and the chairman of the board acting at the time the said resolution was passed was produced for the purpose of showing what was said and done, the attending circumstances, and that it was the intention of the board in passing the resolution for the tax levy, November 9th, 1908, to make the same not only a levy, but also an appropriation of the amounts that would be collected thereunder. The court denied the offer, and would allow nothing to be given in evidence in explanation of the resolution, and held that the resolution standing alone was insufficient to constitute an appropriation for the fiscal year 1909. We think this ruling of the court is reversible error. This is an action brought solely for the purpose of penalizing the appellant treasurer for honestly paying warrants, on the order of the board of county commissioners, for the primary obligations of conducting the government of the county. A most liberal discretion should have been exercised by the trial court in permitting the attending circumstances to go to the jury, with the resolution, so that it might aid them in determining the true intention and pur-

pose of the commissioners in passing the resolution. For aught we know, much may have been done by the board that was not included in the record of its proceedings. It does not always require an actual record of all a board of commissioners may do to make the same binding: *Georgetown & Silver Plume Road Co. v. Hutchinson,* 4 Colo. 50.

A former Court of Appeals, in considering a like question in *Beshoar v. County Commissioners of Las Animas County,* 7 Colo. App. 444-452, 43 Pac. 912, found that the wording of the resolution provided for no specific appropriation for general county purposes, but said the court should take into account the fact that the boards were made up often of men not accustomed to legal forms or usages of legislative bodies, and who could hardly be expected to use the accuracy and precision which characterizes the work of trained persons in such work. The court held that no precise form need be used in order to make the resolution effective within the terms of the legislative act, and further said that, by looking to the list alone, it did not find in terms an appropriation for ordinary county purposes; that the phraseology adopted by the board was unhappy, and inexact, in that it said "for ordinary county revenue, 6 mills," and that, taken by itself, it would look as though the object and purpose of the resolution was simply the settlement of the levy which should be made, and a statement of the probable amount to be derived from that size and description. It inferred, however, that from the attending circumstances as indicated in the resolution generally, such as making appropriations for other purposes, and it being the duty of the board to make the levy and appropriation at the same time, it must have been the intention of the board to make an appropriation for "general county purposes."

The recorded resolution of levy for the fiscal year 1909, which is claimed to have been intended also as an appropriation, reads in part as follows:

"Upon motion the following levies on taxable property in Grand County were ordered for the year 1908, the same to

be extended on the tax roll by the County Assessor and by him certified to the County Treasurer for collection. For state purposes, 4 mills; for county redemption fund, 5 mills; for county general revenue, 10 mills; for road fund, 4 mills; for general school fund, 4 mills; military poll, $1.00." (Then follow the amounts for the different school districts.)

This resolution was passed November 9th, 1908. The words of the resolution provide for a formal levy of 10 mills on all the taxable property of the county, for county general revenue. The resolution did not stop with the ordinary words for making a levy of specific sums on all the taxable property of the county for specific purposes, but added thereto "the same to be extended on the tax roll by the County Assessor and by him certified to the County Treasurer for collection." The appellant treasurer operated under the same form of resolution in 1908, and seems to have had no difficulty in accomplishing the purposes of the statute thereunder. When he made a collection, he divided it according to the levy and put it in the respective funds, exactly as he would have done if the resolution had stated that there was *levied and appropriated* the specific amounts that were intended to be realized by the levy. In March, after the close of the appellant treasurer's term, the board had Mr. Morton M. Hamma, a certified public accountant, examine his books of account, and he failed to find any substantial error therein. At the end of the fiscal year, December 31st, 1908, his books were in a commendable condition, with every fund solvent, and there was something like $5,000.00 in the treasury, revenues collected during 1908. The board, at its meeting in January, 1909, allowed the bills for the last quarter of 1908 and, it would seem, the salaries for the last 12 days of the terms of the county officers whose terms were about to expire. The board also issued warrants for these bills amounting to $2,093.42 which the appellant treasurer promptly paid, cancelled and delivered to his successor in office, who accepted the same, together with all other property of the county then in his hands, including a treas-

urer's check for $3,065.93, the balance of the county fund of the fiscal year 1908. Subsequent to this settlement, the succeeding treasurer concluded he had discovered that no appropriation had been made by the board during the last quarter of the fiscal year 1908, and notified the board then acting that he would not pay out another dollar until an appropriation for the fiscal year 1909 was made. On April 7th, 1909, the board met and seemingly endeavored to pass a *nunc pro tunc* appropriation resolution for the fiscal year 1909 which reads as follows:

"Motion duly made that the annual appropriation be made at this time for the ensuing fiscal year of 1909 on account of no appropriation having been made by the former board of county commissioners. * * * Upon motion the following amounts were appropriated to the several county funds: County general revenue fund, $8,519; pay general county expenses, special contingent fund, $1,278; road fund, $3,407."

The levies made in 1908 of 5 mills for county redemption, 4 mills for general school fund, and $1.00 for military poll tax, if attempted to be appropriated at all in the above stated resolution, were not appropriated in the name of the funds for which the levies were made. However, the trial judge declared such *nunc pro tunc* resolution void, first, because it was not timely, or made during the last quarter of the fiscal year 1908. We think the trial court was misled in its ruling by an *obiter* appearing in the opinion in *La Plata County v. Hampson*, 24 Colo. 127-132, 48 Pac. 1101, to the effect that, where an appropriation was once made for general county expenses, and that fund became exhausted, and other obligations of the county were made, it became the duty of the county authorities "to have made provision for these claims at the earliest possible moment, when they could legally have made an appropriation therefor, to-wit: at the time of making the next annual appropriation." If any such narrow construction of the statute as was given it by the trial court in its ruling

upon the *nunc pro tunc* resolution should be approved in a case where there was not, in fact, any appropriation made, then the very existence of the county governments might be at he mercy of the ignorance, inadvertence or bad faith of the boards themselves.

However, we do not hold that it was absolutely necessary for the trial court to have held that there was a sufficient appropriation made by the board in the last quarter of 1908 in order for it to have found "some legal excuse which would free the defendant Mugrage and his bondsmen from liability on account of the things charged in plaintiff's petition," and relieve them of the penalty which it admits is unjust. Such a finding by the trial court in order to accomplish the purpose it desired was unnecessary in this case, wherein it was developed that the resolution was acted under, and the purpose of the statute fully accomplished. It would seem that, after a defective resolution has become *functus officio,* unless some real substantial damage has resulted through the omissions of the board to literally comply with the law, a sound public policy and the laws of estoppel should be a bar to an action by the board of county commissioners to impose a penalty upon a county treasurer, for paying warrants drawn and directed to be paid by it for the necessary expenses of the county.

There is not a syllable or line of testimony in the record before us that indicates in the slightest degree that the County of Grand or any citizen of said county, in any particular, suffered any injury from any omission of duty of the appellant treasurer, and, upon the other hand, the evidence conclusively shows that said treasurer was an exemplary official and that he, in conjunction with the board of county commissioners acting with him, paid every honest debt of the county during their administration, from the current revenues of the county, and turned over to their successors in office a large surplus, including every dollar that came into their hands which had not been honestly paid out on good faith obligations of the county.

The title of the statute, Session Laws of 1891, p. 111, under which appropriation resolutions are required to be made, reads as follows:

"An act to require the affairs of the counties of this state to be conducted from the revenues derived from taxation, and to prevent the expenses of any county from exceeding its revenues."

In *La Plata County v. Hampson, supra*, it is shown that the board of county commissioners in October, 1893, appropriated the sum of $25,000 for ordinary county revenue, "said amount to be paid out for the following objects and purposes, and for no other: * * * county judge, witnesses and jurors, $600; * * * for unforseen contingencies, $5,000." At the June, 1894, term of the County Court, certain witnesses and jurors were in attendance, the *per diem* and mileage of which were admittedly proper charges against the county, provided there had been a proper appropriation therefor. When the certificates of the witnesses and jurors were presented to the board, the special appropriation of $600 had been exhausted, and the board refused to allow the claims. They were assigned to Hampson, who brought action thereon, and he recovered for the amount of the certificates. Upon a writ of error, the Supreme Sourt held that the title of the Act of 1891, as above set forth, concisely states the intent of the act and that it must be accepted and enforced as it reads. The court stated that the revenues of the county were not only sufficient to pay the obligations of that year, but largely in excess thereof, and hence, "if the defense of the county was good at the time presented, it would, nevertheless, have been the duty of the county authorities to have made provision for these claims at the earliest possible moment, when they could legally have made an appropriation therefor, to-wit: at the time of making the next annual appropriation," and the judgment of the trial court was affirmed.

Now, let us contrast the conditions of the instant case with those prevailing in the *Hampson* case, *supra*,

It is admitted in the instant case that the payment of the $2,096.42 complained of was made for the primary and necessary expenses of conducting the government of the county, and upon warrants issued by the board of county commissioners which were cancelled when paid and delivered to the succeeding treasurer. We may logically say, in the very language of the Supreme Court in the *Hampson* case, that "the record shows that such revenues were not only sufficient for this purpose, but largely in excess thereof, and hence, if the defense of the county was good at the time presented, it would, nevertheless, have been the duty of the county authorities to have made provision for these claims at the earliest possible moment." In the *Hampson* case, the board of county commissioners had not even issued warrants for the claims in question, but Hampson sued on the certificates of the county court clerk, and recovered judgment in the trial court, and, if the Supreme Court had descended to a narrow construction of the statute, it would have reversed the judgment and required the exact formality to be observed. However, it adopted the broad judicial spirit and said, if the revenues were not sufficient at the time, the law required the board at the first opportunity to have provided for the payment of the claims sued on, and promptly affirmed the judgment requiring the payment thereof.

In the last named case and likewise in the *Beshoar* case, *supra*, the claims sued on were neither approved by the commissioners, nor were any warrants issued therefor, nevertheless, the appellate court in both cases peremptorily brushed aside all quibbles and technicalities, and required the counties to pay their honest debts out of the current revenues of the current year. How much stronger is the instant case? Here the bills were regularly presented for unquestioned obligations of the county, warrants were properly issued and duly paid out of the current revenues, and substantial justice was done as between the county and its creditors. If the county and the appellant treasurer had stood upon some informalities, and

had refused to liquidate the admitted indebtedness of $2,096.42, then it would have been the imperative duty of the succeeding board, at the earliest opportunity, not only to have provided for, but to have paid these claims. It would seem like consuming the time of the courts in senseless quibbles, after substantial justice has been done, however crude the methods pursued may have been, for this court to sanction the setting aside the substance of things properly settled for the mere sake of formal inaccuracies in reaching proper results. It never was the purpose of these drastic statutes that they should be used by one set of officials in penalizing their predecessors for some technical omission to observe prescribed forms in reaching results demanded by these statutes. No honest citizen of Grand County could desire that this exemplary officer, after so efficiently conducting the duties of his office that not a dollar could be found which was not applied on a good faith debt of the county, or timely turned over to his successor in office, should pay from his personal effects the primary and necessary expenses of conducting the government of the county for the last quarter of the year 1908.

The board of county commissioners of Las Animas County, in the *Beshoar* case, contracted for the printing of the delinquent tax list, and, after the same had been published at an expense of $2,139.15, the board refused to either pay or allow the bill in whole or part, because, it was said, that the board in the preceding year failed to make an appropriation to the general county fund, as provided in said Act of 1891. The trial court sustained the action of the board through a narrow construction of the statute. However, the Court of Appeals swept aside all narrow and technical dogmas of construction, and intimated that, if it were necessary, it might be inclined to hold that the defense of *ultra vires* was not open to the county where the contract had been performed, and the county had received and accepted the benefits and results, and said, as a general proposition, such practices

do not accord with that spirit of commercial honesty which ordinarily characterizes governing bodies.

It is also difficult to see how this executive officer, the appellant treasurer, can be penalized for the omissions of the governing body of the county in failing to pass a technical, formal appropriation resolution. It would seem that the warrants of the board ought to protect him. In *Beeney v. Irwin,* 6 Colo. App. 66-72, 39 Pac. 900, wherein it was sought to hold the county treasurer responsible for the errors of the Board of County Commissioners, the Court said, in part quoting from *County Commissioners v. Lee,* 3 Colo. App. 177, 32 Pac. 841:

"'Wherever a broad, universal and sweeping power is thus given to a governing body, it cannot be conceded that by implication any other body, whether it be a court or one resembling the Board of County Commissioners, should likewise have power to dispose of the public revenues." We cannot perceive that the treasurer is clothed with the power to pass on the legality of the action of the governing body of the county. Power to determine the validity of all claims against the governmental division is intrusted to the board. When they have audited and allowed a claim, and a warrant is issued in accordance with their determination, we cannot see that the statute has clothed the treasurer with the supervisory power to determine the validity of their acts."

Counsel for appellees herein seem to have understood that it was necessary to show that the treasurer had actual knowledge of the failure of the board to pass the proper resolution before he could be held responsible, and, therefore, the treasurer was charged in the complaint with actual knowledge of such omission; but that allegation was not sustained in the proof.

In the *City of East St. Louis v. Flannigan, et al.,* 69 Ill. App. 167-172-3, the court quoted with approval from the *same plaintiff v. Renshaw,* 153 Ill. 498, 38 N. E. 1048, as follows:

"The general rule is well settled that the penalty of an official bond cannot be invoked where the plaintiff has done anything directly or indirectly to mislead the officer," and continuing the court said:

"That the rule as to estoppel, above quoted, is well settled cannot be doubted, but the question is whether it is applicable here where the effect is to bar an action by the city to recover money paid out upon old orders or warrants which it is assumed were drawn upon a particular fund or the revenue of a particular year, and can not be paid out of the revenues of another year unless there be a surplus.

"It would seem too clear for argument that the city should not be heard to complain that in pursuance of its own ordinance the treasurer accepted warrants of former years for licenses. He should not be required to overrule their judgment as to whether such course could be safely pursued, nor should he be required to suffer if their action in that regard was unwise, irregular or illegal.

"* * * * * * * *

"It seems to be argued, however, or to be assumed in the argument, that because the payments in question were illegal as claimed, the city could not be estopped to deny their legality, and in this action recover the money from the treasurer who had followed their express directions, or been misled by their conduct in that regard, and, therefore, it is urged that the city may now proceed as though no direction had been given and no such action had occurred.

"This because the city council is but a limited agency and without the power thus to bind or estop a subsequent council. The proposition as thus advanced, in its application to the case in hand, is hardly to be defended. It may be assumed that the council referred to was fairly chosen, and that it represented the views of a majority of the municipality at that time, but whether so or not, it was invested with full representative power as a council.

"Another council afterward chosen should not be permitted to deny what it did, for the purpose of recovering money from those who acted according to its express direction or were misled by its official proceedings.

"The warrants which were paid, the amount of which the city now seeks to recover, were presumably issued for something of value the city received, and it would seem to be a case of gross injustice and intolerable hardship to permit the city, after having enjoyed what was represented and acquired by such warrants, to recover the amount thereof under the circumstances here disclosed and upon the ground urged."

The reasonings of the Illinois courts are pertinent to the facts before us. By examining the record, it will be seen that the appropriation resolutions passed by the succeeding board were very crude in form and incomplete, and, if the several rulings thereon by the trial court should be affirmed by this court, and we should follow the harsh rules invoked by the appellees in this case, it would render the succeeding board and treasurer personally liable for all the expenses they paid out in maintaining the county government during the year 1909. The succeeding treasurer, who insisted upon repudiating what was done under the defective resolution, admits that he paid out a large check on one of the arbitrary divisions of the county general fund; that he accepted one of these same warrants on taxes due, and paid out several smaller warrants before the April appropriation was passed. If the narrow, harsh construction here invoked could be applied to the actions of the officers of Grand County for the past 15 years, it would probably shift the burden of all the expenses from the taxpayers of the county to the bonded officials and their sureties; and we know of none more to be injured by the strict construction than the appellees themselves.

While the trial court based its judgment upon the ground of a lack of an appropriation resolution, nevertheless, counsel strenuously urge that there were no moneys in the county general fund when these warrants were paid, or at least not

to exceed the sum of $505.64, and seem to desire to penalize this officer, if not for the defective resolution, at least for the payments from the alleged depleted fund.

The evidence shows clearly that, at the end of the fiscal year, December 31st, 1908, with all arbitrary divisions of the county general fund properly transferred, all the respective funds of the county would have been solvent, leaving in the treasury funds collected for the fiscal year 1908 to the amount of about $5,000. The warrants issued for the sum of $2,096.42 were for bills allowed by the board of county commissioners at its January, 1909, meeting, after the close of the 1908 fiscal year, and included the salaries of the county officers for the last 12 days of their terms extending into 1909. We do not know what formal arrangements the board and the treasurer made through transposition of funds or otherwise for the paying of these bills after the close of the fiscal year, but it is certain that they were paid out of the revenues of 1908, fully carrying out the purpose of the statute requiring the obligations of each fiscal year to be paid from the current revenues. It was held in the state of Kentucky that, when the object to be attained by a levy and appropriation for a given fiscal year has been accomplished, and a surplus remains, it must be treated as a part of the general funds of the county and available for general county purposes. *Field v. Stroube, etc.*, 103 Ky. 114-116, 44 S. W. 363.

Whether the same rule may or may not apply in this jurisdiction, where the governing body of the county has allowed the obligations of the fiscal year, issued warrants upon the treasurer for their payment, and the same have been paid out of the current revenues of the current fiscal year, we need not decide. In this case the controlling purposes of the statute are accomplished, and the court will not search for an opportunity to penalize the officers for any minor omission of duty. There is no statute in this state that specifically authorizes a board of county commissioners to institute a suit to enforce such a penalty. We do not say that there might not be cases

wherein the county commissioners might maintain a suit for injuries threatened or suffered by treasurers paying from depleted funds, but there is nothing in this record that would justify this court in considering the enforcement of any penalty therefor.

Under the facts before us, it is our judgment that neither the law nor a sound public policy sanctions the prosecution or maintenance of this suit by the appellees, and the judgment of the trial court should be, and is hereby, reversed, and the case remanded with directions that the same be dismissed.

Reversed.

Decided April 13, A. D. 1914. Rehearing denied June 8, A. D. 1914.

[No. 3818.]

EMERSON v. AKIN.

1. MINING CLAIM—*Discovery in Abandoned Ground.* The location of a lode mining claim must be within the unappropriated land of the public domain. One who has located a mining claim may abandon a portion of it, and may, by a discovery within the part so abandoned, effectually locate another claim. (42, 43)

2. —— *Location—Notice.* The notice required by Rev. Stat., sec. 4197 serves a temporary purpose. Its utmost life is sixty days. In construing the sufficiency of such notice the courts adopt the most liberal rules. The notice being written upon a piece of paper, folded so that no part of the writing appeared, laid upon a stone and held in place by another stone, *held* sufficient, though no other notice so far as appears, was ever posted. (47)

3. —— *Abandonment—Evidence.* Abandonment of a mining claim in the public domain may be proven by the acts of the locator, as well as his declaration. (43)

4. —— *Effect.* Where a mining claim, or any part of it, in the public domain, is abandoned by the locator, without improper motive, what is so abandoned immediately becomes part of the public domain. *Semble,* otherwise as to a simulated abandonment, with intent to avoid performance of the annual labor, and so prolong the locator's right, without compliance with the statute (Comp. Stat. U. S. sec. 2324). (43, 44)

Appeal from Chaffee District Court. HON. CHARLES A. WILKIN, Judge.

MR. G. K. HARTENSTEIN and MR. WALLACE SCHOOLFIELD for appellant.

MR. GEORGE D. WILLIAMS for appellee.

CUNNINGHAM, Presiding Judge.

This is an ordinary action in support of an adverse proceeding, brought by Akin, the appellee. The trial court instructed the jury that they could not find in favor of Emerson, the appellant, defendant below, but submitted the question of Akin's title to the jury, and from a verdict and judgment in favor of Akin Emerson appeals. The other facts necessary to an understanding of the contentions involved will appear as we proceed.

1. It appears that Emerson, prior to the location of the Recompense claim, was the owner of another lode claim, known as the Victor, which covered a part of the same territory embraced within the Recompense claim, the Victor being located long prior to the location of the Recompense. The Recompense claim runs in a general northerly and southerly direction, while the Victor runs easterly and westerly, and crosses, almost at right angles, the Recompense claim, the northerly three hundred feet of the latter claim being substantially coincident with a block of about three hundred square feet near the center of the Victor claim. Emerson placed the discovery notice of the Recompense claim within the territory of the Victor claim, or, according to his contention and theory, within what had been a portion of the Victor claim. Emerson contends that he, at and prior to the location of the Recompense claim, abandoned that portion of the Victor claim which was in conflict with the Recompense. The discovery notice which Emerson posted for the purpose of initiating title to the Recompense lode contained a clause reading as follows:

"This portion of the Victor claim being excluded from that claimed by this location."

This discovery notice was introduced in evidence, and in addition thereto, Emerson testified explicitly that it was his intention to abandon, and that he did abandon, that portion of the Victor claim which he sought to embrace within the Recompense. There was no evidence introduced that tended in any wise to rebut this showing of abandonment by Emerson. The trial judge refused to give instructions tendered by Emerson, submitting, properly, as we believe, the question of abandonment, to the jury, but on the contrary, he instructed the jury as follows:

"Another of these requirements is that the discovery on which the location of a claim is made must be made and must exist upon some part of the public mineral domain not already occupied and held under a prior and subsisting mining location."

Of course this preliminary announcement correctly states the law, but, immediately following this, the jury was instructed as follows:

"And respecting the alleged discovery and location on the part of the defendant here, of the so-called Recompense lode mining claim, the jury is instructed that from all the testimony in this case, before the jury, the facts are insufficient to show either that the ground on which the discovery was made was unoccupied as lode mining ground at that time * * * and that therefore, the acts and doings of defendant Emerson for the location of the said Recompense claim were ineffective and the jury in this case may not find a verdict in favor of the said defendant respecting that part of conflict ground included within the said Recompense claim."

It is evident from what we have quoted that it was the opinion of the trial judge that Emerson could not abandon a part of the Victor claim, all of which he owned, for the purpose of initiating title to another claim, the Recompense, and that, because the discovery on which the location of the Recompense claim was based was made within the boundary

of the Victor, therefore, as a matter of law, the location of the Recompense was absolutely void. In this respect we are persuaded that the learned trial judge fell into error. Of course, there can be no controversy touching the rule which requires that location of a mining claim must be made upon an unappropriated part of the public mineral domain, but it is equally true that abandonment is a matter of intention. The rule supporting these two propositions has been announced so often and so universally that it requires the citation of no supporting authority. We know of no rule, however, that forbids the abandonment by an owner of a valid mining claim, or any part thereof. And when any part of a mining claim is, in good faith, abandoned by the owner, the title of the part thus abandoned reverts to the government. Abandonment may be proven by the acts of the original owner, as well as by his words and statements. If Emerson were now attempting to patent the Victor lode, the very fact that he located the Recompense across it, and based such location upon a discovery made upon the Victor claim, would be competent evidence against him to show an anbandonment of, at least, that part of the Victor claim covered by the Recompense. Or, if some person other than Emerson had thus located the Recompense across the Victor lode, *with the acquiescence and approval of Emerson,* we think it clear that the courts would hold that he had voluntarily abandoned at least so much of the Victor as was covered by the Recompense. We are aware of no authority which would prevent Emerson, under the circumstances here presented, from abandoning that portion of the Victor claim covered by the Recompense, and thereafter locating the Recompense as he did locate it, or as he says he located it. Surely no one's rights were invaded by his conduct in this behalf, and the policy of the government to encourage the development of its mineral domain may be said to have been advanced. What effect the conduct of Emerson in abandoning a part of the Victor claim, if he did abandon it, may have upon his

claim of title to what remained of the Victor lode not conflicting with the Recompense, we are not called upon to consider.

If the owner of a claim abandons any part of it from any improper motive, such, for instance, as to escape the annual assessment, and thereby projecting, or attempting to project, his rights one year into the future, without doing his annual assessment work, then it might well be that such abandonment would be held to have been prompted by ulterior motives, and therefore void. But there was no evidence in this case that Emerson was actuated by such motives.

2. The trial judge further instructed the jury that Emerson had not properly complied with the statutes of Colorado in the matter of posting his discovery notice on either the Recompense or the Recompense No. 2 claim, and for that reason the jury were advised they could not return a verdict in favor of Emerson for that part of the conflicting ground included within the boundary of either of said claims. This necessitates a brief statement of what Emerson's evidence concerning the posting of his notices discloses. No question can be made as to the sufficiency of the discovery notices; the sole contention on this point apparently is that Emerson did not comply with the requirements of the statute in the manner of posting the notice on each of the claims. From the defendant's testimony, considered in the light most favorable to him, we learn that the notice on the Recompense claim:

"Was written on a piece of white paper. The wood lying around was rotten and not fit to write a notice on, and I wrote it on a piece of white paper, and erected a stake, and placed the notice upon it—the white paper would simply be a speck alongside of the stake—and put it in the cut. I did not fasten the notice on the stake. It was leaning up against the side of the cut, and the notice was placed on the surface rock, and another rock put on top of it so it would not blow away, and the fold of white paper stuck up the side a piece. * * * I did not put anything on the post. I put it in the open cut. it was leaning up against the side of the cut, then the paper

was put up so that it would show above that; of course that was up several feet above the ground. It was placed on the nearest hand side of the cut as you go in. I mean that the notice was several feet above the bottom of the stake which I set up. * * * Now it was put down with this large fold sticking up beside the stake, like that (indicating); a rock was put on this point of it here to hold it up. The writing was not exposed. The writing was inside of the fold. I could not tack it up. The notice was laid on a rock in that fashion (indicating) and another rock placed on it in that fashion (indicating). The rock did not cover up the whole of the notice; just the way it is there (indicating); it was a pretty good sized rock. The only part exposed was that part which stuck up. There was no difficulty on the part of Mr. Akin and Mr. Hershberger in finding it. (Meaning the notice, and referring to a time when the parties referred to went with witness to look at these discovery notices.) The rock had not been laid on top of the entire notice, just a part of it, I think. I should think that probably half of the fold was sticking out, an inch and a half or two inches of the notice. The notice was legible and could be read when taken out of there. The portion which was sticking out had been exposed to the weather."

This notice was posted on August 17th, the day the claim was located. Witness testified that he was not back to the claim between August 17 and October 16, when it is admitted on all hands that the parties were able to find the notice, the sole contention being as to how much search was required before the notice was found. The location of the Recompense was made in an old abandoned tunnel or adit driven into the side of the mountain.

There are very few authorities to be found directly in point, or sufficiently parallel in their facts as to be controlling or even helpful in this case. The nearest parallel case appears to be that of *Donahue v. Meister*, 88 Calif. 121, 25 Pac. 1096, 22 Am. St. Rep. 283. From the opinion in that case it ap-

pears that the facts as to the posting of the discovery notice are as follows:

"The notice was placed on the claim in this way: it was written on one side of a sheet of paper, which was folded with the writing inside, and placed upon a mound of rock three feet high, and upon the notice were placed two flat rocks, so that about ¾ of an inch of the margin of the paper was exposed to view, the rest of paper being obscured by the two stones which covered it."

Thus it will be seen that the methods pursued in posting the discovery notice in the *Donahue* case were strikingly similar to the methods pursued by Emerson in posting the discovery notice on the Recompense claim. In the *Donahue* case the trial court ruled that the notice was not conspicuously posted, and that its posting did not comply with the rule then in vogue in California, which required that the discovery notice should be "posted conspicuously in a conspicuous place." Our statute requires that the locator shall post, "at the point of discovery on the surface *a plain sign or notice,*" etc. If there be any difference between the California rule and the Colorado statute pertaining to the posting of the discovery notice, the rule of the former state is more exacting as to the prospector than our statute. The Supreme Court of California, in the *Donahue* case, reversed the trial court, saying:

"In so holding, the court, we think, erred. It was not found that the notice was so placed for the purpose of concealing it; but it was found that the location was made in good faith, and that 'in posting said notice, defendant, Meister (who posted the same), intended protecting it from the weather, and had made prior locations the same way.' It is further found that 'other devices were resorted to by miners to protect the notices from the weather, such as covering the notice with glass, or folding it in a box and placing the box in a conspicuous place.' If the plaintiff had attempted to relocate the claim immediately after defendant's notice had been placed there, and before defendant had done further acts of

possession, and before there had been any legislation by congress upon the subject, and the only question had been as to the sufficiency of the posting, still, we think, that the posting, as shown by the findings, would have been sufficient."

In other words, the Supreme Court of California ruled, as a matter of law, that the posting in the *Donahue* case was sufficient. It is only necessary for us to hold (and that is all we do hold) that the trial court in the case at bar erred in holding, as a matter of law, that the posting was insufficient. The entire opinion in the *Donahue* case may be read with profit. But we desire to call attention to the fact that in reversing the lower court and remanding the *Donahue* case for new trial, the Supreme Court of California, in its opinion, used this further language:

"Our conclusion is, that—whatever evidence may be presented on another trial—under the facts as shown in the findings before us, the posting of the defendant's original notice should be held to have been a substantial and sufficient compliance with the said custom," thus unequivocally directing the trial court to find, on the second trial, as a matter of law, that the evidence as to the posting of the discovery notice was sufficient.

In *Upton v. Santa Rita M. Co.*, 14 N. M. 96, 89 Pac. 285, it is said:

"We do not believe this to be within the spirit of mining laws, which have ever held that, in the matter of location notices, the courts shall take a liberal, and not a narrow view."

It is further announced in the Upton case that:

"The posting of the location, however, is not the basis of the title. It is simply a provision of the law by which, in connection with the subsequent record, the world may have notice that the lode discovered is being claimed as a mining location."

In other words, this preliminary posting serves, and is only intended to serve, a temporary purpose; its utmost life is sixty days, within which time the locator must sink his shaft

and stake his claim at all the corners and the centers of the two side lines. It is not probable that within these sixty days any very great wrong can be done the public or any individual, if the discovery notice should be defective in form, or in the method of its posting, and for this reason, we apprehend, the courts have universally adopted and applied the most liberal rules in considering the sufficiency of the discovery notice, both as to the form and the posting thereof.

In the case of *Gird v. California Oil Co (C. C.)*, 60 Fed. 543, it was held that a discovery notice placed in a tin can and the can placed by the locator on a shelf in a rock mound was sufficient, and answered the purpose for which it was required.

The posting of the discovery notice on the Recompense No. 2, being even more conspicuous than was the posting of the notice on the Recompense claim, it is not necessary that we should state the facts with reference thereto, or comment upon them. If the action of the trial court, in taking from the jury the question of the sufficiency of the posting of the notice on the Recompense, constituted prejudicial error, as we think it did, then *a fortiori*, error was committed in taking the same question, as applied to Recompense No. 2, from the jury.

For the reasons we have assigned, the judgment of the trial court is reversed, and the case remanded for further proceedings in harmony with the views herein expressed.

Reversed and Remanded.

COURT OF APPEALS—Decided April 13, 1914. April T. 1914.

[No. 3829.]

COLORADO SPRINGS AND INTERURBAN RAILWAY COMPANY V MARR.

1. TRIAL—*Pleading and Evidence—Variance.* Where the instructions direct the attention of the jury to the real question in issue, a variance not misleading will be disregarded. (52)

The complaint of a passenger against the carrier alleged that while plaintiff was upon the step of defendant's car, and in the act of alighting,

the car was violently started, etc. The evidence was that plaintiff had in fact alighted, and had placed her knee upon the running board, in the act of reaching for her luggage, and that while so engaged and in full view of the conductor, the car was started. Judgment for plaintiff was affirmed. (51, 52)

2. DAMAGES—*Pleading as to.* Pain and suffering, the natural consequences of a physical injury, may be allowed for, though not specifically demanded. (55)

3. ——*Evidence as to.* Action by a housewife for personal injuries. The evidence showed that prior to the injury plaintiff had been accustomed to do her own housework, to entertain her friends, and prepare for them elaborate meals, and that since the injury she had been a chronic invalid. An instruction that plaintiff was not to be allowed for her inability to perform her household duties, or for her inability to entertain her friends, or for loss of time, either past or future, was held properly refused. (52)

4. INSTRUCTIONS—*To be Construed as a Whole.* Action by passenger against carrier for injuries attributed to the negligent setting in motion of the car while plaintiff was in the act of alighting. An instruction told the jury that the action was for negligence in the operation of the car, "in stopping and starting it." There was no allegation or proof of negligence in stopping the car. Other points of the charge fully presented to the jury that plaintiff claimed for negligence in starting the car. *Held* that construed as a whole the charge was not misleading. (54)

An instruction declared that plaintiff was claiming for the "negligent manner in which the defendant operated and controlled its car." It was argued that this assumed negligence on the part of defendant. By another point in the charge the jury were told that "the burden of proof rests upon plaintiff to establish the negligent acts of which he complains." The contention was overruled. (53, 54)

5. PLEADING—*Certainty.* The averment of facts showing negligence will suffice, though there is no express allegation of negligence. (54)

6. NEGLIGENCE—*Definition.* A charge that "negligence is the failure to observe, for the protection of others, that degree of care, precaution, and vigilance, which the circumstances demand," sustained. (53, 54)

7. PASSENGER CARRIER—*Duty to Passenger.* A charge that it is the duty of a public carrier "to exercise the highest degree of care, skill, and vigilance, reasonably practicable in the conduct of its business, to avoid injury to the passenger," was sustained, though making no allusion to "the mode and character of the conveyance." (53, 54)

Appeal from El Paso District Court. HON. W. S. MORRIS, Judge.

MESSRS. CHINN & STRICKLER for appellant.

MESSRS. ORR, ROBINETT & MASON for appellee.

MORGAN, Judge.

The defendant company appeals from a judgment against it for $5,500 in the El Paso District Court on a complaint for

damages for personal injuries sustained while plaintiff was alighting from one of defendant's street cars on August 16, 1908.

Eighty-one assignments of error are discussed under the following contentions:

(1) That there was a variance between the pleading and the proof concerning the circumstances under which the plaintiff sustained injuries; (2) that the court erred in giving and refusing instructions; (3) in admitting testimony to which defendant objected; and (4) that the verdict was excessive.

The complaint alleges that "plaintiff stepped down upon the step of said car, * * * and while she was upon the step of said car and in the act of alighting therefrom * * * said car was * * * by defendant company carelessly and negligently caused to suddenly and violently start forward, thereby * * * throwing her off her balance and throwing her violently and forcibly from said car to the ground."

Plaintiff testified: "I got off the car * * * and turned round with my face toward the motorman and began to take this luggage off the car, * * * and found I could not reach it, and I then put my right knee well up on the running board and leaned over to get this other piece of luggage, and * * * while I was reaching out * * * it started * * * and I was thrown."

Her daughter testified that plaintiff—"Did not get off until it came to a stop, then she reached up for the baggage, and * * * put one knee on the running board."

Defendant contends this testimony was at variance with the allegations, and that the court should have sustained a motion for a directed verdict. Such contention is clearly disclosed by the following quotation from the brief of counsel, wherein it is contended that such testimony shows that—"the company started up the car *after* she had alighted therefrom and when she had *returned to the car* and placed herself

partially on it for the purpose of taking hand baggage therefrom; * * * there was no allegation and no evidence that the defendant knew or ought to have known that * * * she intended *to return to the car* for the purpose of taking hand baggage therefrom *after* safely alighting at her destination." (Italics ours.)

The gravamen of the charge in the complaint is that the defendant was *negligent in starting the car while the plaintiff was in the act of of alighting.*

The plaintiff testified that her skirts and clothing were never, at any time, free from the car before it started up and threw her to the ground. The testimony further shows that she and her daughter were sitting in the seat side by side, with hand baggage on the floor, that she was on the outside, and started to get off first, that the daughter fell back into the seat when the car started, and did not get off until after the accident; that the conductor saw them get on, and was in full view of the plaintiff when she was getting off, and had ample opportunity to ascertain that she had not completed the act of alighting when the motorman started the car.

The court instructed the jury that it was the duty of the defendant "to ascertain before starting the car that the plaintiff was not then in the act of alighting;" and further, "If, therefore, you are satisfied from a fair preponderance of all the evidence introduced on the trial that the defendant neglected such duty, and negligently started the car, with a sudden and violent jerk, while plaintiff was alighting therefrom, * * * then the defendant is liable, etc.; and further, "the specific act of negligence alleged is that the defendant carelessly and negligently caused said car to suddenly and violently start and jerk forward while said plaintiff was on the step thereof, * * * and in considering the negligence of the defendant company you will devote your attention to a consideration of that specific act of negligence and no other; and you are further instructed that unless you believe from a preponderance or greater weight of the evidence that the

defendant caused said car while it was standing still, and while plaintiff was upon the running board thereof and *in the act of alighting therefrom,* to violently start and jerk forward, thereby throwing the plaintiff to the ground, your verdict must be for the defendant." (Italics ours.)

The defendant was not misled by the slight difference, if any, between the pleading and the proof, in view of the instructions. The court restricted the jury to the allegations, and correctly stated the law applicable thereto and to the proof. *Cincinnati, H. I. & R. Co. v. Revalee,* 17 Ind. App. 657, 46 N. E. 352; *Robbins v. Diggins,* 78 Iowa 521, 43 N. W. 306; *Montgomery v. Colo. Spgs. & I. Co.,* 50 Colo. 210, 213, 114 Pac. 659.

The first contention of the defendant concerning the instructions is that the court erred in refusing two requests: (1), that the jury be instructed that they could not "allow plaintiff anything by way of damages to compensate her for her inability to perform her ordinary household duties or for her inability to entertain her friends;" and (2), that they could not allow her "anything for loss of time that she may have sustained or which she may in future sustain, if any, by reason of the injuries complained of, if any." The contention is that as the plaintiff was permitted to testify over objection that she did her own housework *before* the accident and enjoyed getting up big dinners and lunches, and had been a chronic invalid *since* the accident and not able to do anything; that she had been in the habit of entertaining her friends *prior* to the injury, and was unable to do household duties *since* then, the court should have given the instruction requested. It was not reversible error to refuse these requests, for the reason that such testimony seems to have been offered to prove plaintiff's physical condition, and it tended to prove the extent of her injuries, alleged, and the condition in which she was left. The court instructed the jury as to what they should consider in measuring plaintiff's damages and that they should allow damages only for injuries complained of and pleaded by the

plaintiff. This contention is fully disposed of against the defendant in the following cases: *City of Denver v. Human*, 9 Colo. App. 144, 47 Pac. 911; *Colo. Sprgs. Int. Ry. Co. v. Nichols*, 41 Colo. 272, 92 Pac. 691, 20 L. R. A. (N. S.) 215; *Denver City Tramway Co. v. Cowan*, 51 Colo. 64, 116 Pac. 136.

(2) The second contention concerning the instructions consists in errors claimed as to the giving of instructions 1, 3, 6, 7; the alleged erroneous portions of which are as follows:

1: "The plaintiff in this action claims *as the result of the careless and negligent manner in which the defendant company conducted, operated and controlled a car* along its line of road, and upon which car the plaintiff was a passenger, in stopping and starting said car at a time when the plaintiff alighted therefrom."

3: "The court instructs the jury that negligence is the failure to observe, for the protection of the interests of others, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

6: "It was the duty of defendant to exercise the highest degree of care, skill and vigilance, reasonably practicable in the conduct of its business, to avoid injuring the plaintiff, and to afford her an opportunity to safely alight from the car on which she was riding."

7: "You may take into consideration the nature and character of the injuries, the *mental and physical pain*, if any, she has suffered, or will suffer as the proximate result of such injuries, whether such injuries and suffering have been pleaded by the plaintiff in her complaint, and proven by a fair preponderance of all the evidence introduced on the trial."

In number 1, it is contended, the court assumed, as a matter of fact, that the company operated its car in a careless and negligent manner; that there is no allegation of such negligence, and no allegation of negligence in *stopping*.

The answer to these contentions is: the court was stating, in a general way, the claims of plaintiff and also of the defendant; and furthermore, in another place, the court specifically instructed the jury that "the burden of proof rests upon the plaintiff to establish * * * the negligent acts of the defendant of which she complains herein, and referred to in these instructions."

While the complaint does not allege in specific words, negligence in *operating,* it states the facts showing it; and while it is true there is no specific allegation of negligence in *stopping,* the other instructions fully present to the jury that the negligence complained of, was in *starting* the car, while the plaintiff was in the act of alighting.

While the definition of negligence in instruction number 3, is not word for word, the same as our courts have usually given, it is a correct definition (2 Cooley on Torts, 3 Ed., page 1325, 29 Cyc., 415), and one that was held good in the late case of this same *Company v. Allen,* 135 Pac. 790, in a case very similar to this. Furthermore, this definition was immediately followed by a definition requested by defendant.

In Number 6, it is contended that the words used are not the same as used in the case of *Colorado Company v. McGeorge,* 46 Colo. 15, 18, 102 Pac. 747-748, 133 Am. St. 43, Ann. Cas. 880. The instructions are practically the same, although the one given does not contain the words, "in view of the mode and character of the conveyance." The words, "reasonably practicable in the conduct of its business," fairly convey the same meaning, the evidence considered.

The contention as to number 7 is that the jury could, under this instruction, find damages for mental and physical pain and suffering, and many other items of damage not alleged, or claimed, in the complaint, but referred to in the testimony, such as: melancholy feeling, pain, inability to entertain her friends, to get up big dinners, having gray hair, losing her hair, etc., but this instruction further restricted the jury as follows: "Providing such injuries and suffering have

been pleaded by plaintiff in her complaint." Furthermore, the authorities, quite generally, agree that damage for pain and suffering may be proved and found without specially pleading it, in cases where pain and suffering are inseparable from the physical injury, and are a natural consequence thereof. *Gronan v. Kuckkuck,* 59 Ia. 18, 12 N. W. 748-9, wherein the court says: "But as mental pain is the natural and inevitable result of personal injury, damages therefor need not be specially pleaded." *Oolitic Stone Co. v. Ridge,* 774 Ind. 558, 91 N. E. 944, 951; *Western Brewing Co. v. Meredith,* 166 Ill. 306, 46 N. E. 720; *Louisville & Nashville R. Co. v. Dickey,* (Ky.) 104 S. W. 329; *Montgomery v. Lansing Elec. Ry. Co.,* 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287.

There was no error in the admission and exclusion of evidence.

The verdict was not excessive. No good will be accomplished by reciting all the injuries sustained and then saying, under such facts the verdict was not excessive. There is no new question raised or involved on the subject. No authorities are cited, nor is any new point raised, or old one, upon which a question of law arises. The injuries proved would have justified a larger verdict.

The judgment is affirmed.

CUNNINGHAM, P. J., not participating.

[No. 3836.]

COHEN v. FOX.

1. EXECUTION AGAINST THE BODY—*Malice—Statute Construed.* Malice as used in Rev. Stat. sec. 3024 is to be taken in its odious and malevolent sense. (58)

2. —— *Verdict.* To justify execution against the body malice must be distinctly found. (58)

3. DAMAGES—*Exemplary—Statute Construed.* Malice as used in Rev. Stat. sec. 2067 may be inferred from reckless and wanton acts, such as disclose an utter disregard of consequences. (58)

4. APPEAL AND ERROR—*Harmless Error.* Action for negligence, the complaint alleging a wilful and reckless disregard of the rights of plaintiff. The court directed the jury to find whether defendant was guilty of

malice, and the question was answered in the affirmative. *Held*, there being no evidence of express malice, that, having regard to the statute allowing execution against the body the question should not have been submitted; but inasmuch as there might have been evidence or inference of malice, or wantonness, not appearing in the record, the court having regard to the statute allowing exemplary damages, declined to disturb the verdict. (58)

5. —— *Judgment.* The court below having improperly awarded execution, against the body, this clause of the judgment was ordered stricken out. (58)

Appeal from Denver District Court. HON. HUBERT L. SHATTUCK, Judge.

MR. JOHN T. BOTTOM for appellant.

MR. PHILIP HORNBEIN for appellee.

Opinion modified and rehearing denied.

MORGAN, J.

The plaintiff ran out into West Colfax avenue between Clay and Dale Court streets in Denver to rescue her infant brother from an apprehended danger of his being run over by an approaching motorcycle, on which the defendant and another were riding, and which ran against the plaintiff, and threw her against the curbing, from which she sustained injuries. She sued the defendant for damages for the personal injuries thus sustained, alleging negligence in the first cause of action, and a wilful, reckless and malicious disregard of the rights of the plaintiff, in the second cause of action. She prayed for judgment for $2,245 compensatory damages, $1,000 for exemplary damages, and asked for an execution against the body of the defendant under the statute, section 3024 R. S., 1908.

On the trial the defendant asked the court to require the plaintiff to elect as to which cause of action she would rely upon, and she consented to rely upon the first cause of action, provided the question as to malice, as alleged in the second cause of action were determined by instructions to the jury; and, with this understanding, the court proceeded with the

trial, without any ruling upon the motion. However, the court instructed the jury that if they believed from a preponderance of the evidence that the injury complained of was attended by circumstances of malice, or a wanton and reckless disregard for the plaintiff's rights and feelings, they might award the plaintiff, in addition to her actual damages, such exemplary damages as they might deem reasonable.

The court further submitted a special interrogatory to the jury as follows: "Was the defendant guilty of malice in connection with the injuries sustained by the plaintiff?" The jury answered this question in the affirmative, and it was probably requested by the plaintiff, and propounded by the court, with special reference to the terms of the body judgment statute, aforesaid; but there is nothing in the instructions, nor in the interrogatory, showing that such was the purpose. A general verdict for $600 was returned, upon which judgment was entered, and a jail sentence of two months, or until the judgment was paid, imposed.

It is difficult to determine from the record whether the court should have instructed the jury that it might find exemplary damages; it is evident, however, that the court should not have submitted the special interrogatory, with reference to malice as used in the statute concerning a body judgment, because there is no evidence of express malice, and nothing from which it could be inferred, that is, such malice as is involved in that statute. *Geraghty v. Randall,* 18 Colo. App. 194, 70 Pac. 767.

The word malice, as used in our statutes, in the two separate instances, involved herein, is susceptible of two different constructions as to its meaning and use:

First, the word malice, as used in the statute, ch. 68, R. S. 1908, section 3024, (the body judgment statute), is used in its *odious* and *malevolent* sense. (*Geraghty v. Randall, supra).*

Second, malice, as used in the statute concerning exemplary damages, section 2067, R. S. 1908, may be found by

the jury or the court from the *reckless and wanton acts* of the injuring party, such as disclose an utter disregard of consequences, aside from any intentional malice in its odious or malevolent sense.

In the case of *Geraghty v. Randall, supra,* the court very plainly indicated that the statute concerning a body judgment uses the word malice in its odious sense, and the court should have been requested to define malice, as used in that statute, in accordace with that opinon, if the special interrogatory was intended for such purpose; but, as no such request was made and no such instruction given, the jury may have found the defendant guilty of malice, as defined in the instructions, concerning exemplary damages. To justify an execution against the body under the statute aforesaid, there should be no uncertainty as to the finding of malice by the jury. *Corryell v. Lawson,* 25 Colo. App. 432, 139 Pac. 25.

It remains to be determined whether the court committed reversible error in instructing the jury that they might find malice, wantoness, or recklessness, upon which to base exemplary damages. It is possible in this case that the jury and the trial court saw, or became conscious of, more and greater evidence of malice, or recklessness and wantonness, under the exemplary damage statute, than appears in, or may be ascertained from the written record, and for this reason, this Court will not hold that there was error in this respect; therefore, even if the general verdict of only $600 includes some necessarily small sum of money that may have been allowed by the jury as exemplary damages, in addition to compensatory damages, in the way of doctors' bills, hospital expenses and personal injuries, this court will not disturb it.

The judgment of the lower court is affirmed with directions to modify it by striking out that part which refers to the body judgment.

Decided April 13, A. D. 1914. Rehearing denied June 8, A. D. 1914.

[No. 3906.]

AGNEW v. MATHIESON.

1. NEGLIGENCE—*No Injury Resulting.* A corporation borrowed money of plaintiff, executing a promissory note for the amount, the secretary of the corporation subscribing the note merely as surety. Plaintiff sent his wife to collect the amount at maturity. She carried the note in an envelope. The president of the corporation paid the lady interest, and a portion of the principal and gave her in the envelope, a new note for the balance, subscribed by the corporation only. The lady had no knowledge of this substitution, nor of a like substitution, on a second occasion; nor was she authorized to consent to it. The original note coming afterwards to the hands of the plaintiff, he instituted an action thereon against both the principal and surety. The surety defended upon the ground that she had been informed by the president of the corporation that the note was paid, and that by the negligence of the plaintiff in the premises, she had been left in ignorance of the facts, lulled into a sense of security, and so lost an opportunity to protect herself. But it appearing that prior to the first substitution, the surety had become bankrupt, and therefore unable to have taken any steps for her protection, even if she had known all the facts, the defense failed. (61, 62)

2. NEW TRIAL—*Surprise.* An application of defendant for a new trial on the ground of surprise in the evidence produced by plaintiff must be denied unless the attention of the court is called to the surprise at the time of the trial, and application made for some proper relief.

The pleadings examined, and held to fully advise the party of the claim asserted by her adversary. (62, 63)

Error to Denver District Court. HON. GREELEY W. WHITFORD, Judge.

MR. E. I. THAYER, MESSRS. GARWOOD & GARWOOD, MESSRS. DAVIS, WHITNEY & MOTHERSILL for plaintiff in error.

MR. A. D. QUAINTANCE and MR. M. E. PETERS for defendant in error.

CUNNINGHAM, P. J.

Mathieson, the defendant in error, as plaintiff below, brought his action upon a joint and several promissory note given to him by the Psychic Science Company, and the plaintiff in error, Rose A. Agnew, the note representing money borrowed from Mathieson. The note sued upon was dated April 29th, 1909, and was made to mature two months later. On or about the date of the maturity of the note referred to,

plaintiff's wife presented the same to J. Howard Cashmere, the president of the Psychic Science Company, and Cashmere paid her the interest then due, and $150 on the principal of the note, and endorsed these payments on the back of the note, writing across the face of it the following: "Paid by new note for two months for $1,350." At the time of this transaction Cashmere drew up a second note in favor of plaintiff for $1,350, due in two months, and delivered the same to the wife of the plaintiff, retaining the old note. Note No. 2 was signed by the Psychic Science Company only. Shortly after that note fell due, plaintiff's wife also presented it to Cashmere for payment, and he endorsed thereon the following: "$45 interest paid to October 9-09," and across the face of it wrote the following: "Paid by renewed note October 9-09." This second renewal note, or note No. 3, was also signed by the Psychic Science Company only, but for some reason not explained, was made payable to Maggie Mathieson, the wife of plaintiff. On the trial all three of the notes were produced, and were introduced in evidence. Mrs. Mathieson testified, in substance, that the original note had been left by her with one John McDonough, who apparently had the custody of it for the convenience of the Mathiesons; that it was kept in an envelope, and when she presented it to Cashmere, she simply handed him the envelope containing the note; and in like manner she presented, supposedly, note No. 2, at the time it was taken up and note No. 3 issued; that she had no knowledge whatever that Cashmere had written anything across the face of note No. 1, or that he had substituted in lieu thereof note No. 2; nor did she have any knowledge, according to her testimony, of the substitution of note No. 3 for note No. 2. She, having no knowledge whatever of the substitution; of course gave no consent to that transaction. It appears that after note No. 1 and note No. 2 had thus gone into the possession of Cashmere, they were kept in the safe of the Balance Publishing Company. Cashmere appears to have had complete control over both com-

panies. Afterwards Cashmere got into trouble, which landed him in the penitentiary, and his secretary delivered notes No. 1 and 2 to some representative of Mathieson, and they all came into the hands of his attorney. As we have said, suit was brought by plaintiff on the original note, and he repudiated the two renewal notes, testifying positively that he had given his wife, who, because of his illness, transacted his business for him, no authority whatever to consent to the surrender of the original note, or to accept either of notes No. 2 or 3. The defendant Agnew testified that she signed the first note, and that after Cashmere had taken it up, he exhibited it to her, with the memorandum and endorsements above referred to upon it, advising her that she had been entirely released from her obligation upon the note. She insisted, at the trial, that she had signed the note simply as a surety, and that the money was obtained solely for the use of the Psychic Science Company. On the trial there was no appearance for the Psychic Science Company, and default was entered against it. The case was tried to the court without a jury, and the judge found: "That the fraud, in the judgment of the court, was known alone to Cashmere." We think the evidence is ample to support this finding. Judgment was rendered against Agnew, from which she sued out a writ of error, by which the case is brought to this court for review.

1. Under the facts stated, there is but one serious question for our consideration, and that is, whether the plaintiff, Mathieson, by delivering the note to his wife for presentation to Cashmere, as the head of the Psychic Science Company, was grossly negligent, in that he put it within the power of Cashmere to perpetrate a fraud to the injury of Agnew. We are not strongly impressed with this argument, which seems to be based largely upon the theory that Cashmere possessed some sort of psychic power over both Mrs. Agnew and Mrs. Mathieson, who appear to have been devotees of his cult. At the time Mrs. Agnew signed the note, she was actively and officially connected with the Psychic Science Company, being

its secretary, and the librarian and stenographer for the company, or for Cashmere. By signing the note, she indicated to Mathieson her confidence, both in the solvency and integrity of Cashmere, and the Psychic Science Company; so if anyone was imposed upon, it would appear to have been Mathieson, rather than Mrs. Agnew. Moreover, the record shows that Mrs. Agnew had stated, prior to the presentation of the first note, that Cashmere had all of her money, and that, by reason thereof, she was bankrupt, and living upon the charity of friends, hence his misrepresentation to her as to her release from the note can hardly be said to have lulled her into a sense of security, to her injury, for it does not in any way appear that had she had full knowledge of all that transpired, she could have in any way protected herself from her liability on the first note, the one here sued upon. Indeed, as we have seen, there is evidence tending to show that there was no opportunity whatever for her to have so protected herself.

2. It is urged on behalf of defendant that the trial court erred in overruling her motion for a new trial, which was based largely upon a claim of newly discovered evidence, and upon surprise. Defendant insists that she,

"Had no means of knowing, either from the pleadings or otherwise, that plaintiff could or would claim that said second note of $1,350 had been procured or delivered by fraud, or otherwise, and that defendant had no opportunity to meet such testimony, having had no prior intimation that such testimony could or would be produced."

We discover no merit in this contention, first, because no objection, based upon surprise, was made to the introduction of testimony on the trial.

"Objection on the ground of surprise is waived unless the party surprised calls the court's attention to the matter at the time, and asks for some proper relief."—*Outcalt v. Johnson,* 9 Colo. App. 519.

The authorities on this point are numerous and harmonious. Second, we can not agree with the contention made

on behalf of plaintiff in error as to the pleadings, for the complaint in the cause set out the original note *in haec verba*, and in and by the complaint the defendant was advised that the plaintiff would go to trial upon said first note; indeed, the whole complaint is bottomed upon note No. 1, and upon nothing else. It would therefore seem unreasonable to contend that the defendant could not know that the plaintiff would insist that this note had never been paid, but was still in full force and effect. Defendant must have known, by inevitable deduction, that in order for plaintiff to rely upon note No. 1, he would have to show that No. 2 was a fraud, and that the cancellation made across the face of No. 1 was a fraud. But defendant was not driven to this deduction, palpable though it was, for in the fifth paragraph of the complaint appears the following:

"Plaintiff further states that there now appears written across the face of said note the following, to-wit: 'Paid by new note for two months of $1,350.00,' and plaintiff alleges that said writing has been placed there since the execution and delivery to him of said note. That the same has been placed thereon without his knowledge, and without his consent or authority. Plaintiff further alleges that said note has not been paid by the issuance to him of a note for the sum of $1,350, or at all, save and except the payment of the sum of $150 as aforesaid, and that said note is in full force and effect according to the tenor as above set forth."

By the complaint itself, therefore, it is clear that the defendant was fully advised of all the facts which would make the deposition of Cashmere (whose affidavit she produced on her motion for new trial) necessary, and being in the penitentiary, it can hardly be said that Cashmere could not have been found before the trial and his deposition taken. Third, the infamous character of Cashmere's conduct, as disclosed by the evidence in this case, would hardly justify the setting aside of a judgment and the granting of a new trial for the purpose of taking his deposition.

We are persuaded that the evidence in the case is sufficient to sustain the findings and judgment of the trial court, and for that reason the judgment will be affirmed.

Judgment Affirmed.

[No. 3909.]

TIBBETTS v. TERRILL ET ALS.

1. APPEAL AND ERROR—*Law of the Case.* The judgment of the Supreme Court is, both as to matter of fact, and matter of law, conclusive upon a subsequent writ of error, in the same cause, removed to this court. (68)

2. FRAUDULENT CONVEYANCES—*Improvements Made by Purchaser with notice,* of the fraud, and without necessity, are made at his peril. (69, 70)

3. —— *Mortgage by Fraudulent Grantee—Subrogation.* As a general rule where a purchaser's title fails, he will be subrogated to the right of the holders of prior encumbrances which he has paid, or which have been discharged out of the purchase money.

But a fraudulent grantee who knowingly participated in the fraud has no standing in the court of equity, and will not be subrogated, or in any way protected as to moneys paid by him to discharge liens existing at the date of the fraudulent purchase. (70, 71)

Terrill purchased lands of Dickenson. Part of the purchase price was represented by a mortgage to Dickenson. Terrill afterwards conveyed the lands to his wife, without consideration, and for the sole purpose of defeating the just claim of a creditor. Alley subsequently purchased the lands from the wife of Terrill, with constructive notice of the fraudulent character of her title, but without actual notice of the fraud, and acting in entire innocence. His title being vacated on bill brought by the creditor, he was allowed moneys paid by him to discharge the mortgage to Dickenson. (71, 72)

But he was denied any allowance for moneys paid to discharge a mortgage executed by Terrill's wife, after a judgment recovered by the creditor had become a lien upon the land.

4. NOTICE—*Facts Putting Upon Inquiry.* One who purchases lands with notice of facts which put him upon inquiry as to the title of his grantor is chargeable with notice only of those facts which diligent inquiry on his part would have developed.

The conveyance to his grantor having been made in fraud of creditors, it is not to be assumed that those participating in the fraud would have confessed their turpitude. (72)

5. PRECEDENTS—*Effect.* The general language of a judicial opinion is to be read in connection of the facts of the particular case. (73)

Error to Rio Blanco District Court. HON. JOHN T. SHUMATE, Judge.

MESSRS. ROGERS, ELLIS & JOHNSON, and MR. PIERPONT FULLER for plaintiff in error.

MR. JAMES C. GENTRY for defendant in error, Alley.

HURLBUT, J., rendered the opinion of the Court.

The original complaint in this action was filed August 8, 1902, by plaintiff in error (plaintiff below), and the action was brought to enforce the collection of a judgment for $6,378, rendered January 5, 1901, in favor of plaintiff Tibbetts, against David P. Terrill. The judgment was recovered in Arapahoe County, in the Second Judicial District, and transcript thereof filed for record with the clerk and recorder of Rio Blanco County, on the 18th day of January, 1901. Plaintiff caused execution thereon to be issued and sent to the sheriff of Rio Blanco County, who levied upon the property in issue on April 29, 1901. After the levy, Louise C. Terrill brought an action against Tibbetts *et al.*, in the District Court of Rio Blanco County (June 18, 1901), and succeeded in securing a restraining order out of that court against the sheriff of Rio Blanco County, therein recalling the said execution, vacating the levy, and prohibiting the sheriff from further proceeding to advertise and sell the property under the execution. Apparently that suit was never prosecuted to a final hearing. On September 9, 1901, and while the injunction suit was pending, plaintiff Tibbetts caused a *lis pendens* to be filed with the clerk and recorder of said Rio Blanco County, it being therein stated that on November 22, 1900, defendant David P. Terrill, then being the record owner of the premises, conveyed the same to John L. Gray, his attorney; that on December 30, 1900, said Gray deeded the premises to defendant Louise C. Terrill, wife of said David P. Terrill; that on October 3, 1901, the said Louise C. Terrill, with full knowledge and notice of the filing of said transcript of judgment, and *lis pendens*, as aforesaid, deeded said property to defendant J. A. Alley; that said *lis pendens* gave notice that plaintiff would urge and contend that the transfers and conveyances made by said David P. Terrill, John L. Gray and Louise C. Terrill, as aforesaid, were without considera-

tion, fraudulent, and void as against plaintiff Tibbetts. After said restraining order had been issued, and after the conveyance of the property hereinbefore mentioned, the present action was begun. It seeks to secure a decree of the court canceling all said conveyances, subjecting the property to plaintiff's lien, and ordering the property sold to satisfy the judgment of $6,378.

This is the second time this case appears in our appellate courts. At the first trial judgment was rendered for defendants Alley *et al.*, from which plaintiff prosecuted an appeal to the Supreme Court, which court, in April, 1908, reversed the judgment and remanded the case. *Tibbetts v. Terrill*, 44 Colo. 94, 96 Pac. 978, 104 Pac. 605. It was tried again in the District Court without a jury, and judgment was again rendered for defendant Alley, from which this appeal is taken. In the second trial all the evidence which had been introduced at the first trial was admitted, followed by other evidence upon an issue which had been formed by an amendment to defendants' original answer, the issues thus tendered pertaining to improvements made on the property after Alley's purchase, and to a mortgage existing thereon at the time Tibbetts fastened his judgment lien on the property. The amendment was apparently filed because of the language used by the Supreme Court in the latter part of its opinion in the case cited.

The statement of the facts of this case by Justice Bailey in *Tibbetts v. Terrill, supra*, renders it unnecessary for us to restate them in full. In that case the Supreme Court substantially held that, although defendant Alley paid to Mrs. Terrill full value for the property, he was not a purchaser in good faith without notice; that the deeds between the Terrills and Gray were fraudulent and void as against the judgment creditor Tibbetts; that Alley made the purchase with knowledge and information, by himself and his attorney, of the recorded *lis pendens* and levy, and other facts and circumstances sufficient to put him on inquiry as to the fraudulent character of the deeds between defendants David and Louise

Terrill and Gray; that such facts and circumstances were sufficient to put Alley on his guard, and imposed upon him the duty of further investigating the charge of Tibbetts that such deeds were fraudulent as to him; further holding that the title of defendant Alley, acquired by him through the deed of Louise C. Terrill, was subject to the payment of plaintiff's judgment of $6,378, less $2,000 which Alley was entitled to as a prior claim, through and by virtue of the homestead filed by Louise C. Terrill, September 5, 1901. After that opinion had been rendered, appellant Tibbetts filed in the Supreme Court a motion asking that court to direct the entry of judgment in the lower court in accordance with its opinion. Appellee Terrill also filed a motion asking that the amount of the two mortgages which were standing against the premises when defendant Alley purchased the same from Louise C. Terrill, and which Alley had paid off and cancelled after his purchase, be declared to be a superior lien to that of appellant Tibbetts. The Supreme Court denied both motions in the following language:

"There is nothing in the pleadings concerning these incumbrances, neither is there anything in the original briefs filed in this court relating to them. It appears by the abstract that the consideration paid by the appellee was in part the payment of certain incumbrances, but no issue was made of that matter in the trial court, and we cannot, upon motion, after the rendition of an opinion, determine the merits of a controversy which was not involved in, nor passed upon by, the trial court."

The amendment to the answer above alluded to set up, substantially, that the mortgages were in favor of one C. J. Dickinson, mortgagee, and that the $4,000 represented thereby was a part of the original purchase price in the sale from Dickinson to David P. Terrill; that Alley had purchased the premises in good faith, and paid off the $4,000 represented by said mortgages, with interest, and had caused both to be released of record. The amended answer further alleged that

defendant Alley had placed improvements upon the premises, after his purchase from Louise C. Terrill, of the value of $1,700, which is conceded.

There are but two propositions for consideration by the court on this appeal, viz: (1) Whether or not defendant in error Alley is entitled to an allowance for the improvements placed on the property after his purchase from Mrs. Terrill, and entitled to claim the same as a superior lien to that of Tibbetts' judgment; (2) whether or not Alley should be subrogated to the rights of the mortgagee Dickinson, by reason of having assumed the mortgage of $3,000 at the time of his purchase, and which mortgage he subsequently paid, and whether or not he is entitled to like subrogation after paying off the $1,000 mortgage.

We may say at this time that the questions (1) as to whether or not defendant in error Alley was an innocent purchaser for value without notice, from Mrs. Terrill, (2) as to whether or not he had sufficient knowledge of the facts and circumstances surrounding the giving and receiving of the fraudulent conveyances aforesaid to put him upon inquiry and cause him to investigate further the validity thereof, as against Tibbetts' judgment lien, (3) as to whether or not said conveyances were without consideration, fraudulent, and given to hinder and delay the creditor Tibbetts from collecting his said judgment, and (4) as to whether or not Alley is deemed in law to have possessed constructive knowledge of the fraudulent character of said conveyances and want of title in his grantor, Mrs. Terrill, to convey the premises to him free from Tibbetts' lien—have all been decided and disposed of by the Supreme Court in the case cited, against the claims and contentions of Alley. The rulings of the Supreme Court upon these questions are binding upon us under the doctrine of the "Law of the Case," which is invoked by plaintiff in error.

It may be well to notice here that although the answer as amended alleges that the property was incumbered to Dickinson for $4,000 at the time Alley purchased from Mrs. Ter-

rill, and the same was part of the original purchase price from Dickinson to David Terrill, the record seems to show that only $3,000 thereof was a part of such purchase price. The abstract of title (in evidence) shows that the mortgage to Dickinson from David Terrill for $3,000 was on record before Tibbetts' transcript of judgment was recorded, while the other $1,000 was represented by a mortgage given for that amount to Dickinson by Mrs. Terrill on April 10, 1901, recorded April 22, 1901, which was after the filing of Tibbetts' transcript of judgment. It further appears from the record that the written contract of sale between Mrs. Terrill and Alley makes no mention of the last mentioned mortgage, so that Alley did not assume or agree to pay the same. The facts concerning the payment of this $1,000 mortgage by Alley, as disclosed by the record, are as follows: When the deed from Mrs. Terrill was delivered to Alley on October 28, 1901, he, at her request, paid to the bank, to the credit of Dickinson, $1,000, which sum was deducted from that part of the purchase price which Alley had agreed to pay Mrs. Terrill that day. The $1,000 so paid to Dickinson was for the sole purpose of discharging that mortgage.

Now, as to the question of improvements made by Alley and his right to a lien therefor, it is well to call attention to the circumstances under which such improvements were made. As said by the Supreme Court, Alley bought the premises with knowledge and information of the fraud perpetrated upon Tibbetts by Mrs. Terrill and her grantors, or at least with knowledge of facts and circumstances which in law imposed upon him the duty, before buying the premises, of investigating further the title of Mrs. Terrill. We think, as regards these improvements, that Alley, having constructive knowledge, as he did, of the fraudulent character of the conveyances from David Terrill and Gray, down to his immediate grantor Mrs. Terrill, expended his money in improving the property, well knowing that Tibbetts was vigorously following up his claim and contention that Mrs. Terrill's title

was fraudulently obtained, and was invalid as against his judgment lien. It was in no way imperative that Alley should have made such improvements. His failure to do so would in no way have jeopardized the title which he thought he had. Under such circumstances common prudence should have caused him to refrain from expending any money on the premises other than was absolutely necessary to prevent loss of the same, until after the claims of Tibbetts had been finally determined. This being the situation we are unable to agree with his contention that he should be reimbursed for the improvements placed on the premises after his purchase. He made such improvements at his own peril, so far as Tibbetts is concerned, and ought to suffer the consequences. As between himself and Mrs. Terrill, he had the legal title to the property, and had a right to do with it as he chose, but he assumed the risk of proving he was an innocent purchaser for value without notice. *Shand v. Hanley et al.*, 71 N. Y. 319; *Linthicum and wife v. Thomas*, 59 Md. 574. In *Strike v. McDonald* (2 Harris & Gill) 13 Md. 142, we find this language:

"The quoted passage of Sugd. 525, furnishes a sound practical rule for rejecting claims for improvements, where the transaction is tainted with fraud. It is expressed nearly in these words: If a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction on his mind, expends a sum of money in improvements, he is not entitled to avail himself of it."

We are of the opinion that the District Court erred in allowing for the improvements made by Alley and decreeing the same to be a prior lien to that of Tibbetts' judgment.

We come now to the question of subrogation as applied to the mortgages paid by Alley after his purchase. We will first consider the mortgage of $1,000 given by Mrs. Terrill to Dickinson after Tibbetts' transcript of judgment had been recorded. The determination of this question should require but little space, as Alley's position concerning this payment

does not appear to us to warrant the interposition of a court of equity to save him from any loss he might have sustained through the release of that mortgage. The mortgage was recorded over three months after the recording of the transcript of judgment. Alley not only had constructive notice of the recorded transcript, but he had actual notice thereof at the time he paid off the mortgage. The lien created by the filing of the transcript of judgment was paramount to that of the mortgage, and was in no way affected by it; hence the court erred in decreeing this mortgage to be a prior lien to that of the judgment.

There is but one question remaining for determination, viz: the right of Alley to be subrogated to Dickinson, mortgagee, through payment and release of the $3,000 mortgage. The record shows that at the time Alley purchased the premises from Mrs. Terrill he assumed and agreed to pay that mortgage. It may be well to briefly recite Alley's position in connection with the payment of this mortgage. The pleadings nowhere charge Alley with fraud or with knowledge of the fraud practiced upon Tibbetts, through the execution of the fraudulent deeds referred to, and do not charge him with participation therein. The complaint goes no further than to charge him with notice of the recorded *lis pendens* and its contents.

From the evidence and findings of the court it appears that Alley was a resident of the state of Missouri, had only been in Colorado, or in the vicinity of the premises, about a week before he made the purchase, and had never known David or Louise Terrill, or Gray, prior to that time; that he personally knew nothing about the fraud practiced against Tibbetts by the Terrills and Gray, in the execution and delivery of the said conveyances; that he never had any conversation with any of said parties, or with any one else, concerning the purpose or intent of any of them in the execution and delivery of the deeds; and that at the time the deeds were made he was not within the boundaries of the state, and those

people were entire strangers to him. From this it would appear that the only knowledge he had of the fraudulent purpose in giving and recording such deeds was such knowledge, necessarily constructive, as the law charged against him through notice of the recorded *lis pendens,* levy, and other documents. He might have examined the records thoroughly and made every effort to obtain therefrom information concerning the motives of the Terrills and Gray in giving the deeds, and still the limit of information so acquired would have been that Tibbetts *claimed* and *contended* that the fraudulent deeds were given solely for the purpose of fraudulently defeating him in the collection of his judgment out of the premises. It is more than probable that the question of intent or evil design on the part of the Terrills and Gray in giving the deeds would have remained a closed secret to Alley. He might have interrogated them concerning such intent and design, and would in all probability have failed to elicit any information from them on that subject. It is certainly a reasonable presumption that none of them would have taken him into their confidence, and divulged to him their fraudulent design and purpose in executing the deeds. We have already seen that the Supreme Court held this constructive knowledge possessed by Alley was sufficient to defeat his claim that he was an innocent purchaser for value without notice, thereby holding that he took no title to the premises as against the judgment lien, through the deed executed to him by Mrs. Terrill. Therefore any question as to Alley having any title to the premises as against Tibbetts, by virtue of Mrs. Terrill's deed to him, is closed. Alley is not here complaining on that score, and concedes he has been defeated on that issue; but he vigorously contends that while *Tibbetts v. Terrill, supra,* destroyed his title under the deed from Mrs. Terrill, so far as Tibbetts' judgment is concerned, it did not pass upon or determine his equitable rights emanating from his payment of the $3,000 mortgage. In this contention he is clearly right. The Supreme Court expressly refused to

consider this point. Nothing said in that case can be taken or considered as applicable to this question. In fact the Supreme Court in that case had under consideration but two questions, one pertaining to the homestead claim, and the other to Alley's title under his deed from Mrs. Terrill as against Tibbetts' judgment lien. We believe its reasoning and analysis of the evidence was intended to be applied only to the issue under consideration, viz: Was Alley an innocent purchaser without notice? The rule there was clearly defined, but went no further than to hold that a purchaser from a fraudulent grantee was not an innocent purchaser for value without notice, when the record disclosed that he had knowledge of facts and circumstances at the time of purchase which would put a prudent man upon inquiry, and which if followed up by investigation would have disclosed the fraudulent and defective title of his grantor.

"The rule is familiar that general language in an opinion is to be taken in connection with the facts of the particular case. * * * To make the matter entirely clear we call attention to the difference in the character of the action and the issues therein." *Halbouer v. Cuenin,* 45 Colo. 507, 101 Pac. 763.

There is reputable authority holding that a purchaser from a fraudulent grantee cannot be deprived of his title unless it is shown that he had actual knowledge of the fraudulent intent and design of those actually participating in the fraudulent transaction, and that constructive knowledge, such as given by the record, etc., is not sufficient. Whatever may be the rule in other jurisdictions, we recognize only the rule adopted by our Supreme Court.

The question of Alley's title then having been disposed of adversely to him, has he, under the facts and circumstances here disclosed, any standing in a court of equity for relief against the judgment lien, by reason of having paid off the $3,000 mortgage? We recognize that there is a decided conflict of authority upon this question. It must be conceded

that, when Alley purchased, he knew the *lis pendens* was on record, which notified everybody that Tibbetts *claimed* that the deeds from David Terrill to Gray, and from Gray to Mrs. Terrill, were fraudulent and void, given without consideration, and executed for the purpose of hindering, delaying and defrauding Tibbetts and other judgment creditors of David Terrill; that a levy had been made on the premises under execution issued upon the Tibbetts' judgment; and that he knew of facts and circumstances which, if investigated, would have informed him that a transcript of the Tibbetts' judgment had been recorded. While this constructive knowledge must be attributed to Alley, there is not a word in the record that even tends to show that he was a participant in the frauds, or had any notice or knowledge whatever of the evil intent or design of the Terrills or Gray in executing the conveyances aforesaid. The record shows that he was not in the state when they were given and never knew either of the Terrills or Gray until about one week before he purchased the property. This was about ten months after the fraudulent deeds had been given. The written agreement of purchase between Mrs. Terrill and Alley was made October 3, 1901. Soon after this he went to his home in Missouri, and did not return until about October 28, 1901. In the meantime he had employed two attorneys to examine the title, one of whom had at one time been Mrs. Terrill's attorney. The other had never been attorney for either of the Terrills. Both advised him that Mrs. Terrill had a good title to the premises, and that the claim of Tibbetts as against Mrs. Terrill's title was unfounded and of no force or effect. He relied wholly upon this advice, and, believing Mrs. Terrill had a good title, made the purchase. The record does not tend to show that when Alley made the purchase he intended thereby to further the fraud previously consummated by the Terrills and Gray, or intended in any way to commit any fraud upon Tibbetts or any one else. Alley's situation is about as follows: By the Supreme Court decision he lost his title as

against Tibbetts' judgment lien, except the $2,000 saved to him through the homestead filing of Mrs. Terrill; also the $3,000 paid to Mrs. Terrill at the time he took his deed, and all taxes paid. We have just decided that he loses the $1,700 paid for improvements, and the $1,000 with interest, which he paid to release the second Dickinson mortgage, in addition to which he loses his costs and attorney's fees, which is doubtless quite an item. Must such losses now be augmented by the $3,000 which he paid to release the first Dickinson mortgage? Alley strenuously contends that he paid off this mortgage in the utmost good faith, relying on his attorneys' advice and believing that he had a good title to the premises.

It is well worthy of notice that the *lis pendens* was filed by Tibbetts after the suit was instituted by Mrs. Terrill against the sheriff of Rio Blanco county to restrain him from advertising or selling the property. The record shows the sheriff was enjoined from selling, and that he released the levy previously made under the execution, all of which Alley had full knowledge of *before* he paid off the $3,000 mortgage; so that in addition to the advice of his attorneys to the effect that Tibbetts' claim was of no force or validity as against Mrs. Terrill's title, which he had bought, he had the further assurance of a decree of a competent court of record, corroborating his attorneys' judgment in that regard.

So far as Alley is concerned, there appears to be no badge of fraud disclosed by the record. The Terrills and he were practically strangers to each other at the time of purchase. The record taken as a whole rather tends to show that Alley was free at all times from actual fraudulent design and free from any actual knowledge or information of evil or fraudulent intent on the part of any one connected with the transaction. The only serious charge that can be made against him is that he was lacking in common business acumen and foresight in his dealings with this property. He therefore should stand in a court of equity in a favorable light and receive its protection, provided it can relieve him without doing injustice

to other interests which are involved in the transaction. He stands alone in this litigation, both the Terrills and Gray having defaulted.

"As a general rule where the purchaser's title to the land fails he will be subrogated to the rights of the holders of liens or incumbrances which he has paid, or which have been paid out of the purchase money." *Am. & Eng. Enc. of Law*, vol. 27, p. 239.

The case of *Lynch v. Burt et al.*, 132 Fed. 417, 67 C. C. A. 305, is one in which the facts were quite similar to those found in the case at bar. The court said:

"The facts as clearly give Phipps an equitable claim or right to reimbursement as they exclude Burt therefrom. She (Burt) was an active and conscious participant in the fraud, while he (Phipps) was an entire stranger to it for more than three years after it was committed, and was at no time a conscious participant therein. He was constructively chargeable with knowledge of it, because he entered into the written agreement with Burt, and acquired her title pending the present suit, and subsequent to the Gotzian decree. He also advanced the money to pay Burt's counsel and other expenses in this suit, and was therefore constructively chargeable with her vexatious and wrongful effort to sustain the fraudulent transfer and to defeat the complainant's claim. The evidence, however, clearly establishes that in all this Phipps was acting in perfect good faith, without intent to defraud any one, in a mistaken belief in the honesty of Burt's claim and conduct, and under the approving advice of reputable counsel. * * * In pursuance of the agreement with Burt into which he had entered in good faith, acting upon an honest belief that he had thereby acquired a right and incurred an obligation so to do, Phipps discharged and removed this paramount lien by paying $17,168.33 in redemption from the sale thereunder. Under the rules stated, he was entitled as against complainant to reimbursement for that expenditure, and to have its repayment made a condition to the relief granted to complainant,

and declared a lien upon the lands as the Gotzian claim had been. He was also entitled to interest upon this sum from the date of the redemption," etc.

In the instant case Alley stood in the same relative position as did Phipps in the one cited. Phipps was not a participant in any way in the frauds perpetrated by Burt and others in having the title to the premises fraudulently deeded to Burt, for the purpose of cheating and defrauding the creditors of the judgment debtor Bartholomew Pickert, and he knew nothing about those deeds until three years after they were made and given. In the instant case Alley knew nothing about the fraudulent deeds between Gray, David Terrill and Mrs. Terrill, given for the purpose of cheating and defrauding the creditors of David Terrill, until about ten months after they were given. Phipps, at the time he made his contract with Burt, agreed with her to discharge the Davis mortgage then on record. At the time Alley took the deed in the instant case he agreed to pay the $3,000 mortgage.

In *Tompkins v. Sprout*, 55 Cal. 31, we have another case wherein the facts were noticeably similar to those of the case at bar. April 2, 1877, decision was rendered in favor of plaintiff Tompkins against defendant Charles Peterson, followed by final judgment on April 7th following. April 2nd, after decision, defendant conveyed the land to his brother Gustav Peterson. Gustav received the deed with full knowledge of Charles' intent to defraud the judgment creditor Tompkins and colluded with Charles in the fraud. April 24, 1879, execution on the judgment was issued, and the property sold thereunder, followed by sheriff's deed to plaintiff. Between the issuing of the certificate of sale and execution of sheriff's deed, and about September 28th, defendant Sprout purchased the land from Gustav Peterson, and paid full value therefor, but he had no actual knowledge of the fraud against Tompkins in the deed from Charles to Gustav, though he had both actual and constructive knowledge that the land had been sold at sheriff's sale as Charles'

property and that plaintiff Tompkins held the certificate of sale therefor. He also had actual knowledge of the judgment in favor of Tompkins against Charles. At the time of the sheriff's levy and sale of the premises, there was a valid mortgage on the property, which the defendant Sprout assumed and agreed to pay at the time he took his deed from Gustav, and he afterwards paid off the same and had it discharged of record. Under these facts the court held that Sprout should have been protected, and that if Tompkins sold the premises Sprout would have a first lien thereupon for the amount he had paid to release the mortgage. We quote from the opinion as follows:

"There being, at the time the plaintiff recovered his judgment against Charles Peterson, and at the time of the conveyance from Charles to Gustav Peterson, and at the time of the purchase by plaintiff under his execution sale, a valid, subsisting mortgage lien upon the property, it is obvious that the latter cannot be injured by requiring of him payment of the amount of the lien as a condition precedent to vacating the sale to the defendant. The court below expressly found that defendant had no actual knowledge of the fact that the conveyance from Charles to Gustav Peterson was fraudulent, and that the conveyance from the latter to defendant was constructively fraudulent only. In such case, a court of equity will protect the purchaser as well as the creditor, where, as here, both can be protected without injury to either. * * * *Clements v. Moore*, 6 Wall. 312 [18 L. Ed. 786]; *Coiron v. Millandon*, 19 How. 115 [15 L. Ed. 575.]

"Applying the principles thus announced to the facts of the case under consideration, it is clear that the court below should have imposed upon the plaintiff, as a condition to vacating the sale to defendant, and requiring a conveyance of the property from him to the plaintiff, the payment by the latter to the defendant of the amount paid by the defendant in the satisfaction and discharge of the mortgage lien existing upon the property during the time already stated. In this

way, and in this way only, justice can be done between the parties."

From 20 *Cyc.* 647, we quote the following:

"But where the purchaser's conveyance is merely constructively fraudulent, a court of equity in setting aside the conveyance will protect him, as well as the creditor, where both can be protected without injury to either, as by requiring that the purchaser be reimbursed for a prior incumbrance against the property which he has paid, or for taxes paid."

"When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and can have no relief either at law or in equity. But when the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. If it appears that the grantee has been guilty of no actual fraud, but the circumstances render it inequitable, equity, while it will set aside the conveyance, will protect the grantee to the extent of his payment." 14 *Am. & Eng. Enc. of Law,* 345.

See also 37 *Cyc.* 444.

None of the Colorado cases cited by counsel for either side involve the question we are now considering.

Plaintiff in error contends that the law is settled by the overwhelming weight of authority that if a purchaser expressly assumes the payment of valid mortgages of record at the time of purchase he thereby becomes the principal debtor, primarily and absolutely liable for the debt, and may not be subrogated to the benefit of the incumbrance upon making payment according to his contract. There is authority supporting the rule, but a number of decisions seem to have qualified it and held the same not to be inflexible, viz.:

Matzen v. Shaeffer, 65 Cal. 81, 3 Pac. 92; *Bressler et al. v. Martin et al.,* 133 Ill. 278, 2 N. E. 518; *Young v. Morgan,* 89 Ill. 199; *Cameron v. Holenshade et al.,* 13 Ohio Dec. 430, 1 Cin. R. 83; *Bryson v. Myers,* 1 Watts & S. (Pa.) 420; *Peet v. Beers,* 4 Ind. 46.

While the case of *Capitol Nat. Bank v. Holmes*, 43 Colo. 154, 95 Pac. 314, 16 L. R. A. (N. S.) 470, 127 Am. St. Rep. 108, deals with a situation but little similar to that existing in the instant case, I find the following language which indicates the court's leaning on the doctrine of subrogation:

"We think that the authorities largely preponderate in favor of the proposition that although the deed recites that the purchaser shall pay off the mortgage as a part of the purchase price he is entitled to the subrogation;" citing cases from Illinois, New York, Minnesota, Indiana and California. In the instant case the deed to Alley recited that he assumed and agreed to pay this $3,000 mortgage. Strongly supporting this view are the following cases: *Young v. Morgan, supra; Bressler et al. v. Martin et al., supra; Matzen v. Shaeffer, supra.* In the last case cited the Supreme Court of California held that the vendee paying off the existing mortgage as part of the purchase price entitled him to the benefits of the mortgagee as against the judgment creditor of his vendor, although the mortgage had been released of record, the court saying:

"This presents a case in which the interests of the appellant required that the lien of the mortgage which she paid off should be kept alive. Her interests can only be fully protected by regarding the transaction in which she paid off the mortgage as an assignment of it to her, and the lien as being kept alive for her security and benefit. * * * We think this is one of the cases in which the satisfaction of a mortgage of record does not of itself prevent a court of equity from holding that the payment of it operated as an assignment of it to the person making the payment.

"There is nothing to indicate that appellant when she paid off the mortgage intended to purchase it, or to have it kept alive for her benefit. It does not appear that anything was said on that subject. She paid it off, and the mortgagee without her request satisfied it of record. But the payment was made for her benefit, or for that of respondent. If the

payment under the circumstances operated as an equitable assignment of the mortgage to her, she gets the benefit of it. Otherwise the respondent. Now it is quite clear that she intended the payment of the mortgage should inure to her own, and not to his benefit. She had in view her own, and not his interest. And it is only by regarding the transaction as an assignment of the mortgage to her that her interests can be protected and maintained, and a court of equity will presume that it was intended she should reap the benefit of her investment. Equity regards that as done which ought to be done, and looks to the intent rather than to the form. There is no equitable ground on which the respondent could object to the mortgage lien being kept alive for the protection of appellant's interest, and the mortgage having been satisfied of record when it should have been assigned to appellant, it was not error to vacate the satisfaction."

If Alley acted in good faith in paying the mortgage, and with a desire to save his property from probable foreclosure, and under an honest belief that he had a good title thereto, then he should be protected by the court, if in so doing no injustice be done to Tibbetts. The payment of the mortgage was an entirely separate and distinct act from the taking of the deed from Mrs. Terrill. True, his deed gave him no title to the property as against the judgment lien, but it does not necessarily follow that because he failed to sustain the title which he thought he had, he thereby lost all right of subrogation which he might have otherwise possessed by reason of having paid off the mortgage. The integrity of the mortgage is in no way questioned. It was a valid lien of record when the transcript of judgment was recorded. Alley is not charged with any kind of fraud in its payment. Such being the case, wherein is Tibbetts prejudiced, or wherein does he lose any rights by requiring him to first pay this prior lien of $3,000 from the proceeds of the sale?

In the two cases last cited the Supreme Court without cavil or hesitation invoked equitable principles to administer

common justice and prevent a serious wrong and financial loss to one who was not in any way chargeable with any actual fraud, connivance or evil design, against the judgment creditor, and we say here that this mortgage against which no suspicion of invalidity is suggested was paid off by Alley as part of the purchase price under his agreement to do so, and even though nothing was said at the time as to whether or not he intended to rely upon the mortgage as a protection against Tibbetts' judgment lien, equity will presume that his intention in paying it off was to have it inure to his own benefit, and not that of the judgment creditor. It is clear that at the time Tibbetts' transcript of judgment was filed in Rio Blanco county, the mortgage was of record, in full force and effect, and the creditor could by no rule of law or equity have sold the property under the execution free from the lien thereof. It appears to be a well settled rule of law that a levy by execution or attachment is effective only as against the interest or title in real property which the judgment or attachment debtor has at the time of such levy or attachment. Under these circumstances we do not see why the rights of the judgment creditor Tibbetts should be enlarged, or the value of his judgment lien increased by the fraudulent acts of his judgment debtor. After a court has defeated the evil design of a judgment debtor to defraud his creditors, by setting aside a fraudulent deed given by the debtor for that purpose, we know of no rule of equity that would, as a penalty for the debtor's fraud, destroy the right of subrogation in a third person who has paid off a mortgage which was a paramount lien to that of the creditor's judgment.

Most of the cases cited by plaintiff in error involve transactions between fraudulent grantors and their immediate fraudulent grantees, wherein all are actual parties to the fraud; hence those cases do not apply to a state of facts such as we are now considering. The general rule seems to be that a fraudulent grantee who has actually and knowingly participated in the fraud has no standing in a court of equity

for any purpose, and will not be subrogated or otherwise protected for moneys paid in discharging liens existing at the time of the fraudulent purchase. We think, however, that a purchaser from such fraudulent grantee, who has only constructive knowledge of the fraud, and has no knowledge or information of the fraudulent intention of those perpetrating the same, and in no way participates therein, ought not to be denied relief in a court of equity, where such relief works no injury to others. We think the authorities cited amply support our conclusions and are well grounded in sound, equitable principles.

The judgment will be reversed and the case remanded to the District Court for further proceedings as the parties may be advised, and in case the property be sold under the Tibbetts judgment, there shall be first paid to defendant in error Alley, out of the proceeds thereof, the sum of $2,000, being the amount of the homestead exemption, plus the $3,000 which was paid to release the mortgage; the balance, if any, to be applied on the plaintiff's judgment; plaintiff in error to recover his costs.

Reversed and Remanded.

CUNNINGHAM, Presiding Judge, dissenting:

Finding myself unable to concur either in the reasoning of or the result reached by my associates, and being impressed with the importance of the rule announced in the majority opinion, and the precedent which it establishes, I have reluctantly concluded that it is my duty to set forth, at some length, my reasons for dissenting.

I shall not encumber this opinion with lengthy quotations from the opinion of the Supreme Court rendered in this case when it was before that body, as the same has been referred to in the majority opinion, and will be found in 44 Colorado 94, 96 Pac. 978, 104 Pac. 605. Summarized, the opinion of the Supreme Court squarely holds: 1. That Mrs. Terrill

held the property in trust for the creditors of her husband; 2, that in taking the property from Mrs. Terrill, Alley *wilfully* closed his eyes to the facts and circumstances surrounding the transfer of the property from Terrill to his wife. These are findings of fact. Upon these, and other similar findings of fact, the Supreme Court made findings of law to the effect that knowledge of the circumstances, such as Alley had, was equivalent to *actual* notice, and that, "*In such event, as we have seen, the law assumes that he had actual knowledge of such fraud.*" Italics, wherever used, are mine. In the circumstances of this case, the Supreme Court announces the rule to be, quoting from 84 Fed. 860:

"Courts of equity do not permit a party to claim *any* benefits from his own ignorance of facts which he could have learned by exercise of ordinary prudence and diligence."

The Supreme Court's conclusions, if any authority were required to make the same binding upon us, finds ample support in the authorities, case and text.

"Knowledge or *implied* notice is equivalent to, and constitutes, participation, where the transfer is to one not a creditor." 20 *Cyc.* 471.

"Participation, as the term is used, need not be by some *affirmative* action on the part of the transferee in consummating the fraudulent intent of the transferer, but the transferee is a participator in the fraud if he takes the conveyance with actual notice of the grantor's fraudulent intent, *or under circumstances where the law will impute to him knowledge of the purpose of the transferer*, without his actively taking part in the fraudulent design of the transfer *other than the taking of it.*" 20 *Cyc.* 471 (note). *Kansas Moline Plow Co. v. Sherman*, 3 Okla. 204, 41 Pac. 626, 32 L. R. A. 33.

Furthermore, the right to subrogation is never granted as a reward for negligence. *Fort Dodge Bdlg. Assn. v. Scott*, 86 Ia. 431, 53 N. W. 283.

The majority opinion, in so far as it treats of the money paid by Alley to redeem from the mortgage, appears to pro-

ceed upon the theory that unless one actually enters into a conspiracy, *and by word of mouth discusses the intentions and purposes of the one from whom he obtains his title,* that there can be no *actual* participation in the fraud of the grantor. The authorities last cited are opposed to this view.

My brethren may not approve of the opinion handed down by the Supreme Court in this case, but they ought to be bound by it, and they ought to cheerfully accept it as the law of this case; they have no more right to silently reverse an opinion of the Supreme Court, or ignore it altogether, than they have to, in terms, announce their dissent, and thus refuse to follow it. My conclusion therefore is that, if for no other reason than that the Supreme Court has laid down rules and made findings, both of fact and of law, which are binding upon us, the majority opinion in this case is wrong. But I find myself in hearty accord with the conclusions of the Supreme Court.

My position is that under the decision of the Supreme Court in this case, Alley was guilty of actual fraud, or guilty of such wilful carelessness as that the law imputes to him actual knowledge, and even the majority opinion nowhere combats the universal rule that one guilty of actual fraud may not invoke the doctrine of subrogation. On this point, at least, the authorities are harmonious.

The relief extended to Alley by the majority opinion presupposes a finding that he did not have actual knowledge; that he acted in good faith. These findings are squarely in the teeth of the opinion of the Supreme Court, as I read it.

I am persuaded that my associates have reversed the rules that apply, or ought to apply, in cases of this sort, viz: that:

"The burden is always on one who claims this equity of subrogation to show that he is entitled to it."—Sheldon on Subrogation (2nd Ed.) sec. 11.

"And also that the relief can be granted to him without prejudice to the rights of innocent parties."—Harris on Subrogation, p. 561.

That:

"To entitle a party to subrogation, his equity must be *strong*, and his case *clear*. In such applications great care should be taken by the court that the subrogation will *work no injustice to the rights of others.*"—*Knouf's Appeal*, 91 Penn. St. 78; *Lloyd v. Galbraith*, 32 Penn. St. 103; *Keeley v. Cassiday*, 93 Penn. St. 318;

That:

"The rights of one seeking subrogation must have greater equity than those who oppose him; the burden being upon the would-be subrogee to establish his right, for subrogation will be ordered only in a *clear case of pure equity*. The right is never allowed one who would thereby reap advantage in *any way* from his own wrong-doing. * * * As its purpose is only to prevent fraud or subserve justice, it will not be applied where its exercise would promote injustice, and thus can be applied only with a due regard to the legal and equitable rights of others."—37 *Cyc.* 371; *McNeil v. Miller*, 29 W. Va. 483, 2 S. E. 335:

That:

"The party seeking such relief must show a superior equity, for the equities being equal, the law will be allowed to take its course."—*Pritchett v. Jones*, 87 Ala. 317, 6 So. 75.

The majority opinion appears to proceed upon the theory that the burden was on Tibbetts to satisfy the chancellor that Alley had been guilty of fraud, and that his fraud would work to the injury of Tibbetts. But even under this perversion of the rules, as indicated by the above quotations, the majority opinion is wrong, for, as I shall presently show, the record demonstrates that Tibbetts *will* suffer injury.

In the majority opinion attention is called to the difficulty which would have confronted Alley, had he attempted by inquiry to ascertain whether or not Tibbetts' contentions were well-founded. There are two all-sufficient answers to this: 1, he could have refrained from purchasing the land until that

question was settled; he knew that there was an issue or question on that point, and if he found it difficult to get at the facts, no hardship would have resulted to him had he kept out of the controversy; 2, the Supreme Court has found (44 Colo. 104, 196 Pac. 978, 104 Pac. 605) that if Alley:

"Had pursued these investigations with *reasonable* skill and diligence, he would have ascertained that the consideration which Gray gave for the property was his unsecured promissory note, and the consideration which Gray received for the property when he conveyed it to Mrs. Terrill was the same note, which was still in the hands of Mr. Terrill. He would also have discovered the existence of the judgment in favor of appellant. He would thus have learned that the conveyances leading from Terrill to Mrs. Terrill were without consideration and void as to creditors, or that the consideration for the conveyance from Gray to Mrs. Terrill was paid by Terrill, which resulted in Mrs. Terrill's holding the property subject to the rights of her husband's creditors; that in either event the transaction was fraudulent so far as it affected the creditors. Aside from the knowledge possessed by the attorney, there were sufficient facts known to Alley before the purchase was consummated and the purchase price paid, to put him upon inquiry, *and to charge him with knowledge of facts which he might have acquired if he had exerted himself to the degree of ordinary diligence and prudence in making inquiry.*"

Moreover, my brethren appear to be oblivious to the difficulties that would confront Tibbetts, were he to attempt to establish actual fraud on the part of Alley. Paraphrasing from the original opinion: "He (Tibbetts) might have examined the records thoroughly, and made every effort to obtain information concerning the motives of Alley and the Terrills in giving the deed, and still, the limit of information so acquired would have been that Alley *claimed* and *contended* that the deed from Mrs. Terrill to him was given for a good consideration. It is more than probable that the question of

intent or evil design on the part of Mrs. Terrill or Alley (if there was any) in giving the deed, would have remained a closed secret to Tibbetts. He might have interrogated them concerning such intention and design, and in all probability would have failed to elicit any information from them on the subject. It is certainly a reasonable presumption that neither Mrs. Terrill nor Alley would have taken him into their confidence and divulged to him their fraudulent design (if they entertained one) and purpose in executing the deed." It is worthy of note that we have in this case no evidence whatever that Alley paid off this mortgage, to the lien of which the majority opinion subrogates him, with his own money, or in good faith, except his unsupported statement. It is conceded in the majority opinion, in treating of the improvements made by him, that his conduct was most extraordinary. But it was no more unusual in this respect than in respect to buying into this controversy, and paying off the mortgage before the maturity of the debt it secured. The unlimited opportunity for grave injustice being thus done to Tibbetts ought to make the court doubly cautious in the application of the benign doctrine of subrogation, for the books all hold that it is purely a benevolent rule. There is other evidence to be found in the majority opinion of extreme tenderness towards the supposed rights of Alley, for the writer of that opinion even appears to commiserate with Alley on the loss of the improvements which the majority opinion takes from him; on the sum of money which he says he paid to Mrs. Terrill in cash, and even on the attorney fees and costs which he has paid out in this case! What these items have to do with the matter is not clear; nor is it plain why sympathy should be extended to Alley for the money which he has voluntarily and contumaciously paid out in the way of costs and attorney fees, while overlooking similar expenditures which he has wrongfully forced Tibbetts to incur.

There are only two authorities that are cited in the majority opinion which, to my mind, sufficiently resemble the in-

stant case in their facts to require notice, and they may be readily distinguished. My associates appear to rely largely upon the case of *Tompkins v. Sprout,* 55 Calif. 31. It is apparent upon a reading of that opinion that the Supreme Court made much of the express finding of the trial court that:

"The defendant paid full value for the land and 'did not have actual knowledge of the fact that the conveyance from Charles to Gustav was fraudulent.' "

Here, if Alley did not have *actual* knowledge, he had what the Supreme Court has ruled was the *equivalent* thereto, and therefore, the Supreme Court says *the law imputes to him actual knowledge.* Proceeding upon and supplementing this finding by the trial court, the California Supreme Court, on p. 36, says:

"The court below expressly found that the defendant had no actual knowledge that the transfer from Charles to Gustav Peterson was fraudulent, and that the conveyance from the latter to the defendant was constructively fraudulent only. In such case, a court of equity will protect the purchaser as well as the creditor, where, *as here, both can be protected without injury to either.*"

In other words, I take it that the California Supreme Court found that there was ample equity in the property to cover the claims of both parties. At least there is in the opinion nothing to negative this presumption. Another case much relied upon in the majority opinion *(Lynch v. Burt,* 132 Fed. 417, 67 C. C. A. 305), may be distinguished in the same manner as the California opinion.

The land in this case, with all the personal property thereon situate belonging to Mrs. Terrill (including household furniture, live stock, hay, etc.) was sold to Alley for $7,000. With the $2,000 deducted on account of the homestead right mentioned in the majority opinion, and $3,000 on account of the mortgage debt, it is not probable there will be anything remaining as the result of an execution sale to apply on the

Tibbetts' judgment which, fourteen years ago amounted to $6,378, besides costs, and now must amount to approximately $15,000.

The majority opinion is inconsistent in denying to Alley the value of his improvements, while allowing him for the money he advanced in redeeming the land from the mortgage. The authorities make no distinction between improvements, and money applied to the liquidation of liens which were upon the land at the time of the purchase, and especially in this case ought there to be no distinction made, since it was stipulated that the amount claimed by Alley by way of improvements was $1,700; that they *were permanent and necessary and enhanced the value of the property.* In the majority opinion it is said that Alley, "expended his money in improving the property, well knowing that Tibbetts was vigirously following up his claim and contention that Mrs. Terrill's title was fraudulently obtained, and was invalid against a judgment lien. * * * Under such circumstances, common prudence would have kept him from expending any money on the premises other than was absolutely necessary to prevent the loss of the same, until after the claims of Tibbetts had been finally determined. * * * He made such improvements at his own peril, so far as Tibbetts is concerned, and ought to suffer the consequences."

With this finding I fully agree; but did he not know, when he paid out his money by way of redeeming the land from the mortgage, that "Tibbetts was vigorously following up his claim and contention that Mrs. Terrill's title was fraudulently obtained?" There is nothing in the record to show when he made the improvements with reference to when he paid out the money by way of redeeming from the mortgage, but the record does disclose that he paid out a substantial part of the money *after this suit was started, and a year before the note was due,* that is to say, a year before the mortgage could have been foreclosed or his title jeopardized.

In denying to Alley what he had paid out for necessary improvements, which enhanced the value of the property by $1,700, Judge Hurlbut quotes the following from *Strike v. McDonald,* 13 Har. & G. (Md.) 142, at 193:

"The quoted passage Sugd. 525, furnishes a sound, practical rule for rejecting claims for improvements, where the transaction is tainted with fraud. It is expressed nearly in these words: If a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in improvements, he is not entitled to avail himself of it."

Having quoted, without qualification, the above language from the Maryland case, I suppose my associates concede its applicability to the defendant in error, Alley. Then, we have this remarkable conclusion: that where a transaction is tainted with fraud, and where a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction on his mind, expends a sum of money in paying off a mortgage, he *is* entitled to avail himself of the benevolent doctrine of subrogation, but where he makes valuable improvements, which are necessary to the estate, and which actually enhance the value of the estate, he is not!

The highest court of this country has clearly indicated that as between improvements placed upon land purchased under the circumstances presented by this case, and money paid out to lift an encumbrance therefrom, the law makes no distinction; and that court has expressly ruled that a man who has acted fraudulently, "and with that conviction on his mind," can recover for neither of these items. In *Railroad Co. v. Soutter,* 13 Wall. 517, 20 L. Ed. 543, Mr. Justice Bradley, speaking for the court, uses this language:

"Was it ever known that a fraudulent purchaser of property, when deprived of his possession, could recover for his repairs or improvements, or for encumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man

does to benefit an estate under such circumstances, he does in his own wrong. He can not get relief by coming into a court of equity."—20 *Cyc.* 470; *Gilbert v. Hoffman,* 2 Watts (Pa.) 66, 26 Am. Dec. 103; *Guckenheimer v. Angevine,* 81 N. Y. 394; Bump on Fraudulent Conveyances, § 198; *Weiser v. Kling,* 38 App. Div. 266, 57 N. Y. Supp. 48; *Roller Mills v. Ward,* 6 N. D. 317, 70 N. W. 271; *Seivers v. Dickover,* 101 Ind. 495; *Goble v. O'Conner,* 43 Neb. 59, 61 N. W. 131; *Beidler v. Crane,* 135 Ill. 99, 25 N. E. 655, 25 Am. St. Rep. 349; *Sands v. Codwise,* 4 Johns. (N. Y.) 536, 4 Am. Dec. 305.

There is yet another reason which, in my judgment, ought to bar Alley from the right to invoke the doctrine of subrogation, at least as to $1,000 of the sum which the majority of the opinion allows him; the $3,000 which the majority opinion concludes he ought to recover, was represented by three promissory notes. The last note, of $1,000, was paid by him (if paid at all) in two installments, *the first being paid some eighteen months before the maturity of the note, and the last installment a year before maturity, and five months after this action was brought.* I have discovered no authority which permits one, under circumstances of this kind, to invoke the doctrine of subrogation.

There is still another reason which is, in and of itself, sufficient to defeat the claims of Alley to subrogation, and that is, that at the time he filed his original answer in this case, to-wit, March 21, 1903, he had paid, as the record shows, every dollar that he now claims by way of subrogation, *i. e.*, he had, according to his evidence, extinguished the mortgage by paying all of the notes which it was given to secure, save and except a small balance of less than $350 on the last of the three notes, and this balance was paid before the issues in the case were joined. In the original answer no claim whatever is made by Alley that he had paid off the mortgage and desired that it be kept alive for his use and benefit; nothing whatever is said by him, or on his behalf, concerning the question of subrogation, until the Supreme Court, in April, 1908, (some

five years after he filed his original answer) handed down its opinion in this case. Then, for the first time, and in that court, he sought, by motion, to claim and have enforced in his behalf the doctrine of subrogation. The Supreme Court very properly refused to consider his demand, because, as it says, "there is nothing in the pleadings concerning these encumbrances." Whereupon, he goes back to the District Court, and on September 7, 1909, after a lapse of seventeen months more, files his supplemental answer, setting up the facts upon which he now bases his claim of right to invoke the doctrine of subrogation. In other words, *for more than six years,* while this litigation was pending, he made no claim or mention that he had paid off the mortgage and desired to be subrogated to the rights of the mortgagee. On the contrary, seven times in his original answer he insists upon the illegality and utter want of virtue in Tibbetts' *lis pendens* execution, etc., and upon that defense alone went forward to trial. The original answer of Alley, considered in connection with the opinion rendered by the Supreme Court in this case, conclusively shows that the only mistake that Alley made was a mistake of *law,* not a mistake of *fact,* and the rule that one may not invoke the doctrine of subrogation when his only contention is that he has made a mistake in law, is too elementary to require the citation of authorities.

Innocence of actual fraud *may,* under certain circumstances, entitle a purchaser of mortgaged land who pays off a debt thereon to the right of subrogation, but my associates seem to think it *must* do so, regardless of the grossest and most wilful negligence, and in the face of the clearest possible proof of waiver.

"Subrogation, being an equity springing from the relation between the parties, and created and enforced for the benefit and protection of the one in whose favor it is originated, may be asserted or waived at pleasure, either expressly *or by implicaton.*"—37 *Cyc.* 383.

"The right of subrogation may be lost by the waiver of the party entitled to it. * * * *A long delay without action will be fatal to a claim of subrogation.*"—Sheldon on Subrogation, Sec. 41.

Alley's right of subrogation, if any he had, accrued when he paid the last installment on the mortgage.

"The surety's right of subrogation accrues upon his payment; and as to his principal the statute then begins to run against him, and he should then call at once for the securities, if he desires to be subrogated to them."—Sheldon on Subrogation, Sec. 110.

He paid the last installment January 5, 1903. Six years and eight months elapsed before he attempted to assert his alleged right of subrogation. His supposed right was then barred by the statute of limitations.

"The right of subrogation will be barred by the statutory period of limitations like any other right."—Sheldon on Subrogation, Sec. 110.

If it be said that Tibbetts, by not pleading the statute of limitations, waived his rights to invoke the same, I reply: Alley had waived his right to invoke the equitable rule of subrogation long before Tibbetts was called upon to plead the statute of limitations. But, the truth is, Alley has never asked to be subrogated to the rights of the mortgagee. The prayer of his original answer reads as follows:

"Wherefore, this defendant prays that he go hence without day, with his costs herein expended."

He does not even pray for general equitable relief. And his amendment, filed September 7, 1909, contains no prayer; it is simply an insert in the original answer. So, the climax of Alley's good luck in this piece of litigation comes in the form of a relief for which he has not asked! Having chosen his weapons of defense (specific and general denials *as to the legality of Tibbetts' claims)* and having signified his satisfaction with the battlefield, he goes forth to a seven-year war, at the end of which, having lost everything for which he con-

tended, instead of capitulating, he draws an ancient and forgotten weapon—a stale, so-called equity—and renews the fight, achieving in the end, if the majority opinion shall stand, a signal victory. If he has not already done so, Alley ought to adopt as his coat of arms a rusty sword, with the legend emblazoned thereon, "If at first you don't succeed, try, try again." So far as I am now able to recall, this is the first instance where a litigant has successfully invoked his own *laches* and his mistake of law to arrest the statute of limitations.

From the time the Supreme Court handed down its opinion in April, 1908, until this good hour, Alley has held Tibbetts at bay by advancing an issue or contention which might just as well have been presented and determined on the first trial, and all this time he has benefited by retaining possession of the land, (for the use of which he is not required to account) thus preventing its sale under execution. In the meantime, Tibbetts' judgment has more than doubled, and can now never be made by the sale of the land. In *Lake County v. Johnson*, 31 Colo. 184, 71 Pac. 1106, our Supreme Court expressly ruled that a judgment is conclusive respecting *omitted defenses*, as well as defenses that were *in fact offered*, if the omitted defenses *might* have been plead in the action in which the judgment was obtained.

"A valid judgment for plaintiff definitely and finally negatives every defense, objection or exception which *might* and *should* have been raised against the action; and this is true not only with respect to further or supplementary proceedings in the same cause, but for the purpose of every subsequent suit between the same parties, whether founded upon the *same* or a *different cause* of action."—23 *Cyc.* 1196.

The above quoted text from *Cyc.* is supported by hundreds of citations, from practically every state in the Union.

"The rule is often stated in general terms that a judgment is conclusive not only upon the question actually contested and determined, but *upon all matters which might have*

been litigated and decided in that suit; and this is undoubtedly true of all matters properly belonging to the subject of the controversy and within the scope of the issues, so that each party must make the most of his case or defense, bringing forward all his facts, grounds, reasons or evidence in support of it, on pain of being barred from showing such omitted matters in a subsequent suit; and it is also true that where the second suit is upon the same cause of action, all matters which *might* have been litigated are *conclusively settled by the judgment;* and that generally the estoppel applies where matters which should have been urged as a defense in the first suit are attempted to be made the basis of a second action, or, according to some of the authorities, where defenses which were available against an adverse claim in the first suit, but not then set up, are sought to be used in a second action, either by way of defense, *or as the foundation of a claim for relief."*—23 *Cyc.* 1295.

Lake County v. Johnson, supra, is cited as supporting, and it does support, the last rule announced in the above quotation.

It is true that Tibbetts, in this case, has not interposed estoppel or *res adjudicata* as a defense, but his failure in this respect does not impress me as more serious than the failure of Alley for more than six years to claim the right of subrogation, and his entire failure, up to the present time, to even ask for that right.

The majority opinion sends this case back, "for further proceedings as the parties may be advised." I shall be greatly surprised if Alley does not incubate another time-consuming alleged equity, and project this litigation five years or more further into the future, the while he holds possession of the property and receives the income therefrom.

It is my conclusion that the judgment of the trial court should be reversed, unqualifiedly, and the case remanded with instructions to carry out the directions of the opinion of the

Supreme Court, permitting Alley what was awarded him by that court, and nothing more.

Decided April 13, A. D. 1914. Rehearing denied May 11, A. D. 1914.

[No. 3954.]

MOORE v. CARRICK.

1. FRAUD—*Rescission of Contract for.* Where, in an equitable action to rescind a contract, actual and intended fraud is relied upon, the same rules apply as in actions at law for deceit. (103)

2. —— *Definition.* Actionable fraud is the false representation of a material fact, as distinguished from opinion, made with knowledge of its falsity, or recklessly, without belief in its truth, with intent to induce action by the complaining party, and accepted and acted upon by him, as true, to his injury. (104)

The statement of one offering corporate shares for sale or exchange, that "the stock is good so far as I know," he having no peculiar means of knowledge as to the matter, is a mere expression of opinion, and not to be relied upon as a representation. (105)

3. —— *False Representations Not Relied Upon,* by the party to whom they are made, he making independent investigation, affords no action, except in cases of active fraud or concealment, or when fiduciary relations exist, or where peculiar knowledge on the part of the one making the representation is shown. (106)

4. APPEALS AND WRITS OF ERROR—*Finding on Conflicting Evidence—Depositions.* Where all material evidence for the successful party is by deposition, the court of review is not governed by the usual rule that findings upon conflicting evidence are conclusive. (107)

5. —— *Judgment.* Plaintiff sued to vacate a conveyance of lands, on the ground of actual and intended fraud. A decree in his favor reversed without prejudice to another action on the ground of mutual mistake. (108)

Error to Mesa District Court. HON. SPRIGG SHACKELFORD, Judge.

MESSRS. FRY & WELCH, MESSRS. ROTHGERBER & APPEL for plaintiff in error.

MR. SOLON T. WILLIAMS for defendant in error.

KING, J., delivered the opinion of the court.

This action was brought by Herbert L. Carrick, defendant in error, to obtain the cancellation of a deed by which he conveyed to Thomas B. Moore, plaintiff in error, twenty acres

of land situated in Mesa county, Colorado, for which he received from said Moore ninety shares of the capital stock of The Hudson's Bay Mutual Fire Insurance Company of Vancouver, a corporation organized under the laws of British Columbia. The complaint alleges that the deed was procured by the defendant through his fraud, and through the fraud and conspiracy of defendant and the said insurance company; that the defendant falsely and fraudulently represented to the plaintiff that the said stock was good stock, was worth $110 a share, and that he had paid $110 a share for the same; that the officers and agents of said company, and the defendant, conspiring to cheat and defraud plaintiff, falsely and fraudulently represented to plaintiff that the stock was good stock and worth the sum of $110 a share; that defendant knew such representations were false, and made the same for the purpose of defrauding plaintiff out of his land, and that plaintiff relied upon said false and fraudulent representations, believing the same to be true, and so believing and relying, accepted defendant's offer, and on March 4, 1911, in consideration of said stock, made, executed and delivered the deed; that the said company, at the time of the signing of said deed, was totally insolvent, and that the stock was and is of no value.

The answer admitted the exchange of the land for the ninety shares of stock mentioned in the complaint, and denied each and every other allegation of the complaint.

The evidence on the part of the plaintiff is substantially as follows: Plaintiff and defendant had no conversation or communication, were not acquainted and had not met each other, until long after the transaction in question; plaintiff was a resident of Seattle, defendant of Vancouver, but was doing business in both Vancouver and Seattle as a broker, and buying and selling lands and stocks on his own account. George L. Estes was a resident of Seattle, engaged in the general brokerage business. About February 24, 1911, Estes overheard a conversation between Moore and the Sunset

Realty Company, in which Moore mentioned that he had for sale or trade some stock in the insurance company. Estes followed Moore out of the office, and a conversation took place between them on the street, in which Estes stated that if the stock was good, he thought he might be able to handle some of it, in answer to which Moore said, "You assure yourself that it is all right, and then if you want to make the deal, all right," and suggested that he inquire of the president of the insurance company, and of brokers in Vancouver. At that time, and perhaps about the 27th also, Moore stated that the stock was good, was worth $110—that he had paid that for it. On the 27th of February, Estes procured from Moore, or from his certificate of stock, the name of the president, and sent the telegram and received the following answer:

"Seattle, Wash., Feb. 27, 1911.

Chas. W. Jennings,

Dominion Trust Building, Vancouver, B. C.

What is stock Hudson Bay Mutual Fire worth? What price can it be cashed? Send full particulars.

(Signed) GEO. L. ESTES, 1258 John St."

"Vancouver, B. C., Feb. 27, 1911. 6:12 P. M.

G. L. Estes, 1258 John St., Seattle.

Hudson Bay Fire has no more stock for sale. Vancouver brokers paying 110 per share.

CHAS. W. JENNINGS, President."

About the same time, Estes began to talk with Carrick relative to purchase of the stock. Estes showed the telegram to Carrick, and told him that it sounded good. Both Estes and Carrick went to Vancouver personally to investigate the company and the stock. Estes examined the articles of incorporation, and found that the company was incorporated for $100,000 "guaranteed" stock, so called. He examined the law under which the company was incor-

porated, and came to the conclusion that under such law its capital stock was insured or guaranteed, and inquired of the president of the company and of the cashier of some bank as to its value. Plaintiff had a personal interview with Jennings, president of the company, who told him, and also Estes, that the stock was worth 110 and would be worth more. The conversation between the president and Carrick was on March first. Prior to that time, Carrick, or Carrick and Estes, had secured twenty-six shares of the stock, which plaintiff then offered to sell at par, and took back to Seattle a letter from Jennings, addressed to Estes, dated March first, stating that a man named Allen would take the stock at par, and had deposited a check for $100, and directing Estes to send the stock and draft through a bank in Seattle. This offer was accepted. Thereafter, Estes met Moore, and stated that he could get some fruit land in Colorado for shares of the stock, to which Moore replied, "All right, he would consider anything of the kind if we" (meaning Estes and his client, Carrick) "were satisfied that the stock was all right." Estes told Moore that the proposition was for fruit land in Colorado—twenty acres at $500 an acre. After some negotiations between Carrick and Moore, carried on entirely through Estes, the trade was closed. Estes delivered the deed to Moore and received the stock on or about March fourth. It is shown that at about the time of the foregoing transaction, the Dominion Investors' Corporation, Limited, was attempting to secure, and did secure, a majority (more than $50,000) of the capital stock of said company, for the purpose of obtaining control of the corporation; that they traded property at their market price for the stock at par value, and that other trades were made for the stock at or about the same time; that about November, 1910, one James Ball traded a house to defendant for thirty shares of the said stock, and that Ball got in communication with Moore through an advertisement which stated that the advertiser had some good commercial stock to exchange for a house, and to apply at a certain telephone number, which

thereafter appeared to be the telephone number of the insurance company. It further appeared that some time after the transaction between the plaintiff and the defendant was concluded, the persons who had secured a majority of the stock demanded a statement from the president of the company, and began investigations of its conditions, preparatory to taking charge, whereupon the president fled. Upon such investigation, no assets or books could be discovered. The president was arrested, tried, convicted for swindling, and sent to the penitentiary. Ball caused the arrest of Moore as a conspirator with the company. Upon trial before the county court in Vancouver, at which both Carrick and Estes testified for the prosecution, Moore was acquitted, a transcript of their evidence at that trial being in evidence here. All the evidence upon the part of the plaintiff in this case is by deposition, or transcript as aforesaid, with the exception of one witness as to the value of the land. Neither Carrick nor Estes testified, nor does it otherwise appear, that the statements made by Moore to Estes, relative to the stock, were communicated to Carrick. Neither of them testified that Carrick relied upon such statements, or any of them. The transcript of Estes' testimony before the county judge shows that while Estes was under examination, the following questions were asked and answers made:

"Q. At any rate, he (Moore) left it to you to make your inquiries about the stock in Vancouver? A. Yes.

Q. You did investigate it? A. Yes.

Q. And it was not from anything he said to you that you recommended the deal to your client, but rather from what you learned from Mr. Jennings' telegram, or some other source? A. That's right."

And in his deposition:

Q. But I mean Mr. Moore left it to you to investigate the value of the stock, didn't he? A. He told me to investigate it, yes.

Q. And it was not from what Moore told you, but rather from what you got from Jennings, and what Mr. Carrick found out, that you relied on in making the deal? A. It only backed up what Mr. Moore had already said in regard to the stock—that it was good—that part of it; but I didn't particularly go into the proposition until I investigated both ends of it, you understand. I could tell you that stock was good, but you wouldn't take it until you went and seen what the company was.

Q. Did Mr. Moore ever make any representation of the value of the stock before the deal? A. He spoke about the stock being good—'As far as I know, the stock is good; I would not take less than $110 a share.'

Q. That is what Mr. Moore said? A. Yes.

Q. Did he tell you to investigate? A. Yes."

There was no testimony on the part of plaintiff showing, or tending to show, that Moore did not pay $110 for the stock, nor, indeed, what price he paid; nothing to show that if any of his alleged statements of fact were false, he knew them to be false, except as to the price he had paid; nothing tending to show that he knew or had opportunity to know, anything more about the company's affairs than Carrick and Estes knew. The witness Ball testified that he had seen Moore in the office of the company—Ball was there himself.

At the time of the trial in this case, Moore was called as a witness in his own behalf. He testified that he had owned and traded some of the stock; that the stock he traded to Ball he got from a Mr. Lundy, paying him therefore ten acres of land in Idaho and $750 cash; that the stock he traded to Mr. Carrick he got through a deal with a Mr. G. W. Crotz, of Vancouver, about the middle of February, 1911, in exchange for 120 shares of stock in the Crescent Lumber Company, which he obtained in exchange for 160 acres of land in Washington. The value of the parcels of land and personal property which he exchanged for stock was not given or asked. Moore testified that he was not interested in the insurance

company; had never purchased any stock directly from it, but only in the market; that at the time he dealt with Carrick, it was being traded in the market at $110, and that he believed it was all right, and his testimony was not disputed except as hereinbefore related.

The cause was tried to the court without the intervention of a jury, and the court rendered judgment for the plaintiff upon findings of fact in substance that the insurance company was a "cloak for a swindle;" that the stock was worth nothing; from which, and the further fact that Moore had had some dealings with the president, and had directed Estes to the president for information, it was conclusively presumed that he had done so with knowledge of the president's fraud, and of what answer he would give; therefore was chargeable with actual fraud in this proceeding.

In form, this is an action, equitable in its nature, to recover the purchase price, to-wit, land, paid by the plaintiff for certain shares of stock, after tendering back the stock, and rescinding the contract of purchase and sale, upon discovery of the alleged fraud. The only cause of action stated in the complaint is based upon the fraudulent representations of the defendant, made by him alone or in conspiracy with others. The fraud charged is not constructive or implied, but active, intentional fraud, involving moral turpitude.

There is some diversity of opinion as to whether the same rules which apply to actions to recover damages for deceit apply to cases equitable in their nature, such, for instance, as for rescission of contracts on the ground of misrepresentation; but in this state slight, if any, distinction is made, and we think no difference when the fraud charged is actual and intentional. *Sellar v. Clelland*, 2 Colo. 532; *Larimer County L. & I. Co. v. Cowan*, 5 Colo. 320; *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827; *Connell v. El Paso G. M. & M. Co.*, 33 Colo. 30, 78 Pac. 677; *Colorado Springs Co. v. Wight*, 44 Colo. 179, 96 Pac. 820.

As defined by the foregoing authorities, actionable fraud is a false representation of a material fact (as distinguished from an opinion), made with knowledge of its falsity, or recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party, and relied on by and actually inducing him to act upon it to his damage. See also 9 *Cyc.* 411.

Sellar v. Clelland was an action to recover damages for deceit. *Larimer County L. & I. Co. v. Cowan* was an action in equity, praying for the cancellation of a deed made by the plaintiff. The court quoted and adopted the following rule as laid down in *Kerr on Fraud and Mistake*, 73:

"In order that a misrepresentation may support an action or be of any avail whatever as a ground of relief in equity, it is essential that it should be material in its nature, and should be a determining ground of the transaction. The misrepresentation must be, in the language of the Roman law, *dolus dans locum contractui.* There must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it at all, or at least not on the same terms. Both facts must concur; there must be false and material representations, and the party seeking relief should have acted on the faith and credit of such representations. * * * A misrepresentation goes for nothing unless it is a proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place."

The foregoing excerpt was also cited and quoted with approval in *Wheeler v. Dunn*, at page 436. In *Connell v. El Paso Company*, which was an action in equity for rescission of an executed contract of purchase and sale, for the cancellation of a deed and recovery of the purchase money, Mr. Justice Campbell, speaking for the court, said:

"It is a settled doctrine of this court, ever since the decision in *Sellar v. Clelland,* 2 Colo. 532, that for a misrepresentation to be actionable the party charging the same must, *inter alia,* show not only that it is false, but that the party making it knew it to be false. This general doctrine, however, is subject to the modification that 'when one has made a representation positively, or professing to speak as of his own knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred, or at all events, this is so when the matters falsely represented are peculiarly within the knowledge of the party making them, and are not known to the party to whom they are made.' "

In *Colorado Springs Company v. Wight,* an action to recover damages for alleged misrepresentations, the same rule is approved, and the elements going to make up fraudulent representation, as enumerated by Pomeroy, are given, to-wit: "A misrepresentation, in order to constitute fraud, must contain the following essential elements: (1) Its form as a statement of fact; (2) Its purpose of inducing the other party to act; (3) Its untruth; (4) The knowledge or belief of the party making it; (5) The belief, trust, and reliance of the one to whom it is made; (6) Its materiality."

Under the foregoing rules, there is an utter failure of evidence to support the judgment. Moore's representation that the stock was good, is, under all the authorities, an expression of opinion only; as also under the evidence is his statement that the stock was worth $110, when coupled with the qualification "as far as I know," and as affected by the fact that he had no peculiar means of knowledge as to the condition of the company or the acts of its officers whose criminality or delinquency destroyed the market value, as well as the intrinsic value, of the stock. That statements as to value under such circumstances are generally regarded as opinions only, and may not be relied upon, is decided in *Noetling v. Wright,* 72 Ill. 390; *Page v. Parker,* 43 N. H. 363, 80 Am. Dec. 172; *Poland v. Brownell,* 131 Mass. 138, 41 Am.

Rep. 215; *Plummer v. Rigdon*, 78 Ill. 222, 228, 20 Am. Rep. 261; *Kennedy v. Richardson*, 70 Ind. 524, 534; *Hoffman v. Wilhelm*, 68 Iowa 510, 27 N. W. 483; *Bristol v. Braidwood*, 28 Mich. 191; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Brownlow v. Wollard*, 61 Mo. App. 124; *Nostrum v. Halliday*, 39 Neb. 828, 58 N. W. 429; *Smith v. Mitchell*, 6 Ga. 458; *Little v. Allen*, 56 Tex. 133, 139; *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858. See, also, extended note to *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.*, 37 L. R. A. 593.

In *Connell v. El Paso G. M. & M. Co.*, 33 Colo. 30, 78 Pac. 677, it is held that a representation of the amount paid for property is a material fact, and if false and relied on will avoid the contract. But whether that statement or any of the statements alleged to have been made by Moore are regarded as mere opinions, or as statements of fact, it is manifest that they were not relied upon by the plaintiff in this case. There is a total absence of evidence that these statements were ever communicated to or came to the knowledge of the plaintiff. The record is utterly devoid of any evidence, direct or indirect, tending to show that the plaintiff relied on any such representations, or that Estes, in acting for him, relied on such statements. On the contrary, there is a direct and positive statement made by Estes that he did not act thereon, but rather upon his own independent investigation. That both the plaintiff and Estes did rely upon their own investigations is abundantly established by their own evidence, twice given and recorded. It is almost universally held, under circumstances as here shown, that if investigation is made by the buyer, he cannot claim that he relied on the representations of the seller, except in cases of active fraud or concealment, or in cases where fiduciary relations existed, or peculiar knowledge upon the part of the seller was shown. *Fauntleroy v. Wilcox*, 80 Ill. 477; *Fisher v. Dillon*, 62 Ill. 379; *Port v. Williams*, 6 Ind. 219; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 161 Am. St. Rep. 137; *Grider v. Klopton*, 27 Ark. 244;

Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Anderson v. McPike*, 86 Mo. 293; *Herron v. Herron*, 71 Iowa 428, 32 N. W. 407.

The claim that plaintiff relied upon Moore's statements that the stock was worth above par is negatived by the fact that immediately before he concluded this trade he purchased other of the same stock and contracted to sell the same at par. As to the statement made by Moore that he paid a certain price for his stock, there is no proof that such statement was false, even if there had been anything to show, or tending to show, that such statement had been relied on; and the fact, shown by plaintiff's evidence, that the stock was being purchased in considerable quantities by persons, having as good opportunities for investigation and knowledge as had Moore, and who were taking it at par, corroborates and establishes the truth of defendant's statement that the stock was good and had value, if, as is generally the case, by "value" is meant what it is bringing in the market.

All material evidence upon the part of plaintiff having been submitted by deposition, this court is not governed by the usual rule that findings of the trial court upon conflicting evidence is binding upon the court of review, and the evidence offered by the plaintiff is in no manner aided by the oral testimony of the defendant.

We think it is not amiss to call attention to the fact that plaintiff does not come into this court with unsoiled hands. Representations were made to defendant that the land offered in exchange for his stock was worth $500 an acre, while the evidence offered at the trial showed that as good land, better situated, more highly improved, was offered in the market at $250 or less an acre.

Because of the entire failure upon the part of the plaintiff to sustain the charge of fraud, and because of the conclusive showing that plaintiff did not rely upon the representations alleged to have been made by defendant, the judgment must be reversed and the cause remanded. However,

there remains the possibility that upon proper allegations a case might be stated admitting evidence of mutual mistake upon the part of both the plaintiff and the defendant, of which a court of equity might take cognizance. No suggestion of such a case was made in the trial court or is made in this court. It is evident from the complaint and the finding of the trial court that the cause of action and judgment were based upon allegation and finding of fraud in its most odious sense, and that being true, this court is not at liberty to make a finding or to direct proceedings or judgment under any other theory or cause of action; but the reversal will be without prejudice to the right of plaintiff to institute another action, if he be so advised, for rescission of the contract on the ground of mutual mistake.—*Connell v. El Paso G. M. & M. Co., supra; Colorado Springs Company v. Wight, supra.*

Reversed and Remanded.

[No. 3767.]

MILLER ET AL. v. WELDON.

1. TAX TITLES—*Void Deed.* A treasurer's deed reciting a sale to the county, and an assignment of the certificate of purchase by the county clerk more than three years thereafter, is void upon its face. (110)

2. LIMITATIONS—*Void Deed.* A deed void upon its face does not set in motion the five-year limitation act. (Rev. Stat. sec. 5733.) (110)

3. ——*.Color of Title.—Payment of Taxes.* A tax past due when a treasurer's deed is issued is not to be counted to sustain a plea of the seven years' statute. (Rev. Stat. sec. 4090.) (110)

4. JUDGMENTS—*Record as Evidence.* The mere record entry of a decree quieting title, not accompanied by the judgment roll, is not admissible as evidence of title. (110)

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

MR. R. H. GILMORE for appellants.

MESSRS. DANA & BLOUNT for appellee.

BELL, J.

This action was brought by the plaintiff and appellee, Minnie E. Weldon, against the defendants and appellants, J. L. Miller and The Empire Ranch & Cattle Company, in the District Court of Yuma County, Colorado, August 29th, 1908. In her complaint, she alleges that she is the owner in fee simple and entitled to the possession of the N. W. ¼ Sec. 7, Tp. 4, N. R. 48 W. of the 6th P. M., and that the defendants wrongfully withhold and wrongfully exercise acts of ownership over the same, and prays judgment to the effect that she is the owner of the land above described and entitled to the possession thereof, and for damages in the sum of $250.

The first defense stated in the answer denies the allegations of the complaint; the second sets up that the defendant J. L. Miller and his predecessor in interest, The Empire Ranch & Cattle Company, have been in possession of the land under claim and color of title made in good faith, based upon a treasurer's tax deed, for more than five years, and that plaintiff's right of action did not accrue within five years from the date of the commencement of the action; the third recites that the land in question was vacant, and unoccupied, and that defendant Miller and his predecessor in interest as aforesaid have, during seven successive years, paid all taxes assessed upon the same, under claim and color of title made in good faith; and the fourth alleges that a decree of the county court of Yuma County in the year 1902 quieted the title to said premises in said Empire Ranch & Cattle Company. There seems to have been no other pleading in the case.

The appellee deraigned title from the government of the United States to herself through divers *mesne* conveyances, and the defendants offered in evidence a treasurer's tax deed to The Empire Ranch & Cattle Company, dated April 10th, 1901, and recorded April 22nd, 1901. The deed showed an assignment by the county clerk of the certificate of purchase

more than three years after the date of sale, thereby rendering the same void upon its face, as held in *Johnson v. Gibson*, 24 Colo. App. 392, 133 Pac. 1052, and, upon proper objection, it was excluded as evidence of paramount title, but admitted as color of title.

The deed, being void upon its face, did not set in operation the five-year statute of limitation relied upon in the second defense: *Empire Ranch & Cattle Company v. Howell*, 24 Colo. App. 417-420, 133 Pac. 1124; *Gomer v. Chaffee*, 6 Colo. 314-317.

Under the defense of payment of taxes for seven successive years, under claim and color of title made in good faith, defendants offered to prove the payment of taxes for the years 1900 to 1907, both inclusive. The payment of the taxes for the year 1900, past due when the tax deed issued, could not properly be counted as one of the necessary seven yearly payments. The payment of taxes for the year 1901 could not have been made until 1902, which would be the first payment under the deed to have started the running of the statute, and it was impossible for seven years to have expired between the date of such payment and the date of the commencement of the action. Therefore, the proof offered was insufficient and, upon objection being made, was properly excluded.

In support of the fourth defense, a decree of the County Court of Yuma County purporting to quiet the title to the premises in The Empire Ranch & Cattle Company was offered in evidence. The decree was unaccompanied by the judgment roll and its admission was objected to for this reason, and the objection was properly sustained: *Empire Ranch & Cattle Company v. Battelle*, 24 Colo. App. 375, 133 Pac. 1123.

This left the defendants without any proof of title whatsoever, and without any showing of the right of possession, whereupon judgment was rendered in favor of the appellee.

Numerous objections were raised to the introduction of evidence and the rendition of judgment, and the rulings of the court thereon are now assigned as error. Many of them have been repeatedly decided by this or the Supreme Court adversely to the contentions of the appellants, some of them are without any record in the abstract, in support of the questions presented, and others are wholly untenable, and we have found none, under the condition of the record, that would justify us in disturbing the judgment of the trial court, and, therefore, it is hereby affirmed.

Affirmed.

[No. 3768.]

EMPIRE RANCH AND CATTLE CO. v. WELDON.

1. TAX TITLES—*Void Deed.* A treasurer's deed reciting a sale to the county upon the day on which the land was first offered is void. (112)

So a deed which recites a sale to the county, and an assignment of the certificate of purchase by the county clerk, more than three years after the date of the sale. (112)

2. —— *Tender of Taxes,* paid by one claiming under a tax sale, is not required as a condition precedent to a bill by the paramount owner to quiet his title. (113)

3. JUDGMENT—*Record as Evidence.* The mere record entry of a decree quieting title, without the judgment roll, is not to be received as evidence of title. (113)

4. LIMITATIONS—*Void Deed.* A deed void upon its face does not set in motion the five years' statute of limitations (Rev. Stat. sec. 5733). (113)

5. —— *Payment of Taxes.* Only taxes falling due subsequent to the issue of a tax deed which is relied upon as color of title, are to be counted, under Rev. Stat. sec. 4090. (113)

Appeal from Washington District Court. HON H. P. BURKE, Judge.

MR. R. H. GILMORE for appellant.

MESSRS. DANA & BLOUNT for appellee.

BELL, J.

This action was brought July 10th, 1908, under section 255 Mills' Ann. Code, for the purpose of quieting the title in

the plaintiff, appellee herein, Minnie E. Weldon, to the N. W. ¼, Sec. 8, Tp. 5 S., R. 50 W. of the 6th P. M., in Washington County, Colorado. The plaintiff, in her complaint, alleges that the defendant, The Empire Ranch & Cattle Company, claims some interest or estate in said land adverse to her, but which, she avers, is inferior to her title.

The appellant answered, denying the material allegations of the complaint as its first defense. As a second defense, it avers that on the 31st day of January, 1901, the County Treasurer executed and delivered to it a treasurer's tax deed to said land, which it filed for record February 13th, 1901; for a third defense, it alleges that the title to the premises was quieted in it by a judgment of the County Court of Arapahoe County in 1905; for a fourth defense, it sets up the five-year statute of limitation; for a fifth defense, it avers the land to be vacant and unoccupied, and that it has held the same under color of title made in good faith, and paid all taxes thereon for seven successive years; for a sixth defense, it avers that appellee failed to pay or offer to pay the taxes prior to the commencement of the suit; and for a seventh defense, it alleges the *laches* of appellee in the commencement of her action.

There is no record of any further pleading contained in the abstract. The plaintiff deraigned title from the government of the United States. The appellant, in support of its answer, offered in evidence the tax deed, which was excluded because it was urged that the land was sold to the county the first time it was offered for sale, and because the certificate of purchase was assigned by the clerk more than three years after the date of its issuance.

The deed is clearly void upon its face for both of the reasons assigned. In *Johnson v. Gibson*, 24 Colo. App. 392, 133 Pac. 1052, it is held, in common with numerous other cases, that a certificate of purchase assigned by a County Clerk more than three years after the date of the sale is void; and in *Bryant v. Miller*, 48 Colo. 192-194, 109 Pac. 959, it is

held that, where a tax deed does not show that the land was offered and re-offered for sale by the Treasurer as provided by law, the same is void.

A certified copy of the decree of the County Court, purporting to quiet the title to the premises in the appellant, unaccompanied by the judgment roll, was excluded under proper objection. Under the authority of *The Empire Ranch & Cattle Co. v. Battelle,* 24 Colo. App. 375, 133 Pac. 1123, the trial court's ruling in this respect was without error.

The tax deed offered in evidence, being void upon its face, did not set in operation the five-year statute of limitation, and, therefore, appellant's fourth defense failed for want of proof: *Empire Ranch & Cattle Company v. Howell,* 24 Colo. App. 417-420, 133 Pac. 1124; *Gomer v. Chaffee,* 6 Colo. 314-317.

The first taxes due after the date of the tax deed were in January, 1902, which would make seven successive years' payment of taxes prior to the commencement of the action, July 10th, 1908, impossible, and, therefore, under the offer of the appellant, its fifth defense could not have been proven.

The sixth defense, averring the failure of appellee to tender the payment of taxes before suit brought, and the seventh defense of *laches* are wholly untenable.

Many technical objections arose during the introduction of the evidence to which exceptions were preserved, but we find none that, under the condition of the record, would justify us in disturbing the judgment of the trial court, and, therefore, it is affirmed.

Affirmed.

[No. 3927.]

WHITEHEAD V. VALLEY VIEW CONSOLIDATED GOLD MINING COMPANY.

1. TRIALS—*Non-Suit*, is to be granted only where there is an entire absence of testimony. (115)

2. —— *Motion for Non-Suit*, admits the truth of the evidence produced by the plaintiff, in the sense most unfavorable to defendant, and every inference of fact legitimately deducible therefrom. (116)

3. CORPORATIONS—*Transfer of Stock—Action to Compel.* One holding shares in a corporation, by transfer, delivers the certificate evidencing such shares to an officer of the corporation, in order that the same may be transferred to his name, upon the corporate books, and a new certificate issued accordingly. The officer causes the transfer to be made to himself and other officers of the company.

Semble the shareholder is entitled to a bill in equity against the corporation, and the officers thereof in their official capacity, to correct the wrong. (114, 116)

Error to Pueblo District Court. HON J. E. RIZER, Judge.

MR. JOSEPH DYE for plaintiff in error.

MR. M. G. SAUNDERS AND MR. E. F. CHAMBERS for defendants in error.

Per Curiam.

Plaintiff brought her action in the District Court against the defendant company, and certain officers of the company in their official capacity, alleging that she was the owner of a certain certificate of mining stock calling for 10,000 shares of the capital stock of the defendant corporation; that she delivered the same to W. A. Stewart, as president of the company, for the sole purpose of having the same transferred to her upon the books of said company; that the said Stewart, as president of said corporation, received the said certificate of stock for the purpose aforesaid; that she made demand upon Stewart, and each of the other individual defendants, officers of the company, for the certificate to be issued in lieu of the original certificate delivered by her to Stewart, as aforesaid, and that he and they failed and refused to deliver the same to her. The evidence shows conclusively that the cer-

tificate of stock was delivered to Stewart by plaintiff, upon his solicitation and request, and upon his representation that plaintiff ought to have the said certificate of stock taken up, and new stock issued to her in lieu thereof; that he was the president of the company; it also shows that Stewart caused the same to be cancelled by the secretary of the company, and in lieu of it various certificates of stock, representing the same amount in the aggregate as the original certificate, were issued to Stewart, the secretary, and other officers of the company who were made defendants. Plaintiff prays that the officers be compelled to transfer on the books of the company 10,000 shares of its capital stock to her, in lieu of the certificate which she intrusted to Stewart for that purpose, and for her dividends, which the evidence shows were paid upon the stock after the delivery of the certificates to Stewart. The answer properly puts in issue the averments of the complaint. On the trial, at the close of plaintiff's testimony, defendants moved for a non-suit, which the court granted. We have examined the record with care, and are persuaded that the trial court committed reversible error in granting the motion for a non-suit. It may be well that the defendants have a good defense to plaintiff's cause of action, and if they have, they ought to be willing to go forward and produce the same, and it is unfortunate that they were not required to do so. Our Supreme Court has gone perhaps as far as any other court in the land against the practice of granting non-suits where there is any evidence to sustain a verdict.

"It is only where there is an entire absence of testimony tending to establish the case where a non-suit may properly be ordered or a verdict directed."—*Williams v. Sleepy Hollow M. Co.*, 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170, 11 Ann. Cas. 111.

"Where there is some evidence, although slight, the case should be submitted to the jury if there is more than a scin-

tilla of evidence, and although only evidence in support of the case is the party's own testimony."—38 *Cyc.* 1532-3.

A motion for a non-suit "Admits the truth of plaintiff's evidence and every inference of fact that can legitimately be drawn, and on such motion the evidence will be interpreted most strongly against the defendant."—38 *Cyc.* 1551.

A complete analysis of the testimony in this case would serve no good purpose. An examination of it convinces us that the action of the trial court in sustaining the motion offends against the rule as announced in the authorities cited above, and for that reason the judgment of the trial court is reversed and the cause remanded.

Reversed and Remanded.

[No. 3959.]

BALLINGER V. VATES.

1. PARTIES—*Real Party in Interest.* The assignment of a chose in action, for collection, vests the legal title in the assignee. He is entitled to maintain an action thereon in his own name. (118)

2. ASSIGNMENT OF A CHOSE IN ACTION—*For Collection—Effect.* The assignee of a chose in action for collection holds the judgment recovered thereon as trustee for the assignor, but if by the terms of the assignment, or his agreement with the assignor, he is entitled to his share of the recovery, he cannot be required to enter satisfaction of the judgment until paid what he is entitled to. (119)

3. APPEALS—*Judgment.* Ballinger recovered judgment against Johnson upon a claim of the Stern-Prince Company, assigned to him for collection. Johnson adjusted the claim with that company, and by a decree of the district court Ballinger was required to enter satisfaction of the judgment, though the commission to which, by his agreements with the company, he was entitled, had never been paid. The decree was reversed, with directions to the court below to enter judgment in favor of Ballinger unless, by a day named, the plaintiff should pay into court for the use of Ballinger the commission to which he was entitled, with interest from the date of the judgment; that Ballinger should thereupon execute and deliver a satisfaction piece, that upon his failure to do so, the judgment should be vacated; provided that if it should appear that Ballinger, at the institution of the suit, or the entry of the judgment of reversal, was indebted to the Stern-Prince Company, the amount of such indebtedness should be set off against the claim of Ballinger; and the plaintiff was given leave to amend his reply. (119, 120)

Error to Denver District Court. HON. GREELEY W. WHITFORD, Judge.

MR. JOHN HIPP for plaintiff in error.

MR. EZRA KEELER for defendant in error.

KING, J., delivered the opinion of the court.

January 1, 1909, The Stern-Prince Importing Company retained the State Collection Agency of Denver as it agent for the collection of claims, under a written contract, by which the collection agency agreed that "all accounts worthy of legal proceedings will be placed in its law department for suit, and such suits will be brought at the expense of the agency," and it was agreed that upon judgments secured by it the agency should receive 25% of the judgment. E. M. Johnson, being indebted to The Stern-Prince Importing Company in the sum of $519.75, the company made a written assignment of its claim against Johnson to E. E. Ballinger, for suit and collection; Ballinger was manager of the collection agency. On the 23rd day of February, 1909, Ballinger commenced suit in his own name against the said Johnson, caused summons to be issued and served; thereafter, on or about the 15th day of April, obtained a judgment in the sum of $582.30 and costs taxed at $4.45, and on the 22nd day of April caused a transcript of the judgment docket in said action to be filed and recorded in the office of the recorder of the County of Pueblo, which became a lien upon the real estate of the judgment debtor. All costs and expenses were paid by Ballinger. On or about the 19th day of October, 1909, the said Johnson made a settlement with The Stern-Prince Importing Company by which that company, in consideration of $250 in cash paid to it, and execution and delivery of three notes of $31.50 each, admitted satisfaction of the judgment, agreed to release the same, and gave an order as follows:

"State Collection Agency, City.

Gentlemen—Upon this order kindly release the judgment which you hold for us in your name against E. M. Johnson, Pueblo, and oblige, yours truly,

THE STERN-PRINCE IMPORTING CO.,
By J. L. Stern, Treas."

On presentation of said written request, Ballinger refused to release or discharge the judgment, except upon payment to him of 25% of said judgment. Thereupon Johnson brought suit against Ballinger and the Importing Company, asking for a decree declaring said judgment satisfied. The Importing Company made no defense, but Ballinger filed answer and cross-complaint, setting up the foregoing facts, and alleging that he was interested in the said judgment to the extent of 25% thereof, and the costs by him expended; that the settlement made between the plaintiff Johnson and The Stern-Prince Importing Company was entered into to defraud said Ballinger, and deprive him of his commission and costs, and offering to satisfy and release said judgment upon payment. W. B. Vates, trustee in bankruptcy of the said Johnson, was substituted as party plaintiff. Judgment was rendered in favor of the plaintiff against said Ballinger.

1. Upon the assignment of the chose in action aforesaid to Ballinger for collection, the legal title thereto vested in him. He became the real party in interest, and was entitled to prosecute an action thereon in his own name.—4 *Cyc.* 67; *Lake County v. Schradsky*, 31 Colo. 178, 182, 71 Pac. 1104. While it is true that Ballinger held the legal title to said judgment in trust for The Stern-Prince Importing Company, it is likewise true that his trust was coupled with an interest in himself, and the *cestui que trust* could not compel the assignment of the judgment to it nor require the trustee to release it until it had paid the trustee, or otherwise satisfied him for his interest in the judgment, in this case amounting to at least 25% of the judgment obtained. While the assignee held the

assigned claim for collection, his relation to The Stern-Prince Importing Company was analogous to that of a bailee under contract to perform services for the benefit of the bailor, and for which he was to receive compensation, and entitled to retain possession of the chose in action, or its proceeds, until paid. Their relations have not been materially changed by securing a judgment, except that it is more nearly analogous to that of a trustee holding a legal title for the benefit of his *cestui que trust*, but with an interest which must be satisfied before he can be compelled to execute the trust by turning over the judgment or the proceeds thereof. The judgment debtor, having full knowledge of the suit brought and judgment obtained in Ballinger's name, could not compromise or otherwise settle the judgment by payment to The Stern-Prince Importing Company, except at his peril, and he is not, and cannot be, in any better position to enforce the release or satisfaction of the judgment by the judgment creditor than is The Stern-Prince Importing Company.

A chose in action may be bailed. In this case, the contract of bailment created a trust.—5 *Cyc.* 166; *Cabaniss v. Ponder*, 65 Ga. 134; *Sanders v. David*, 13 B. Mon. (Ky.) 432; *Loomis v. Stave*, 72 Ill. 623; *Pindell v. Grooms*, 18 B. Mon. (Ky.) 501; *Cowdrey v. Vandenburgh*, 101 U. S. 572, 25 L. Ed. 923.

The judgment is reversed and the cause remanded, with directions to the trial court to enter judgment in favor of plaintiff in error, Ballinger, unless within ninety days the plaintiff pay into said court for the use of said Ballinger 25% of the judgment, together with interest thereon from its date, in which event said Ballinger shall be required to execute and deliver a release and satisfaction of the said judgment, or, upon failure so to do, the judgment may be set aside by order or decree of the court; *Provided*, however, that in case the plaintiff can show that the said Ballinger, or the State Collection Agency of Denver, was at the time of the commencement of this suit, and now is, indebted to The Stern-

Prince Importing Company in any sum, the amount of said indebtedness may be offset against the claim of the said Ballinger herein; and for the purpose of making such showing, if he be so advised, the defendant in error herein may be permitted to file amended or supplemental reply to defendant's answer and cross-complaint.

Reversed and Remanded.

[No. 3966.]

KING V. FOSTER.

1. JUDGMENT—*Record as Evidence.* The mere record entry of a judgment, without the judgment roll is not admissible as evidence of title. (121)

2. LIMITATIONS—*Actual Possession and Payment of Taxes,* for seven years, without color of title acquired in good faith, prior to the commencement of the seven-year period, is not sufficient to sustain a plea of the statute (Rev. Stat. sec. 4089). (121)

Error to the Kiowa District Court. HON. C. S. ESSEX, Judge.

MR. JOHN F. MAIL for plaintiff in error.

No appearance for defendant in error.

MORGAN, J.

Code action for the possession of a quarter section of land. The defendant had judgment. The plaintiff brings error.

The plaintiff alleged ownership in fee simple; the defendant denied it, admitted possession and alleged ownership in himself; pleaded the seven years' statute of limitation, and a decree of the District Court of Kiowa County quieting his title, which decree was entered only four years before the commencement of the action herein.

Plaintiff proved fee simple title in himself and rested. The defendant offered no evidence except the decree, aforesaid, and his own testimony, that he was and had been in the actual possession of the land for a little over ten years, that it was fenced when he bought it, and had been fenced

ever since, and that he had paid all taxes on it during that time.

The plaintiff objected to the introduction of the decree on the ground that it was not accompanied by the judgment roll, but it was admitted over the objection. It was error to admit this decree as proof of title without the judgment roll, and, as it was not made but four years before this action was commenced, it did not support the plea of the statute of limitation pleaded, even if it be considered as color of title. Actual possession for seven years and payment of taxes is insufficient to sustain the plea of the statute in the absence of proof of color of title made in good faith prior to the commencement of the seven years period.

Judgment Reversed.

[No. 3970.]

HOLLINGSWORTH v. RING.

1. PRACTICE—*Appearance—Effect.* A general appearance cures all defects in the service of the summons. (123)

By filing a motion to vacate a judgment by default, in no manner limiting his appearance, the defendant waives all defects in the service of the summons. (123)

2. JUDGMENT—*Record—Signature of Judge,* is not required. (124)

3. —— *Vacating—Surprise, etc., Diligence Required.* A motion to vacate a judgment by default, rendered upon constructive service of process, under Rev. Code sec. 81 is addressed to the discretion of the court. Its action will not be disturbed unless a gross abuse of discretion appears. (126)

A delay of over twenty days in applying to vacate a judgment, after the defendant has notice thereof, is sufficient ground to deny the application. (125, 126)

4. APPEAL—*County to District Court.* Judgment rendered in the county court August 29th. September 20th motion to vacate the judgment, under Rev. Code sec. 81. Motion denied. An appeal to the District Court was held properly dismissed under Rev. Stat. sec. 1536. (126)

5 —— *Affirmation in the District Court,* of the judgment appealed from, upon dismissal of the appeal, is mere surplusage. (126)

Error to Lincoln District Court. HON. W. S. MORRIS, Judge.

MR. WILLIAM H. CROW for plaintiff in error.

MR. J. E. BARNGROVER for defendant in error.

CUNNINGHAM, P. J.

Defendant in error, O. M. Ring, brought his action in the County Court of Lincoln County, and obtained a judgment in that court, by default, against the plaintiff in error, Hollingsworth. The summons was served, or attempted to be served, on July 26, 1911. (We shall presently refer to the matter of service.)

On August 29 following, a default order and judgment were rendered against Hollingsworth. On September 20, Hollingsworth appeared generally in the County Court and filed a motion to vacate the judgment which was rendered on August 29, supporting his motion by affidavit, and at the same time filed his answer to the complaint. The County Court denied defendant's motion to vacate the judgment, whereupon he appealed to the District Court of Lincoln County. In the District Court plaintiff, Ring, filed a motion asking that the appeal be dismissed, for judgment affirming the judgment of the County Court, and for judgment against appellant's sureties (presumably referring to the sureties upon the appeal bond from the County to the District Court)—a rather comprehensive and unusual request. The District Court sustained "that part of said motion dismissing said appeal, and affirming alleged judgment of the County Court," whereupon the defendant, Hollingsworth, sued out a writ of error in the Supreme Court, and the case is here by transfer for review.

The abstract in this case is somewhat informal, and in no manner conforms with Rule 5 of this court, which is the same as Rule 14 of the Supreme Court, requiring plaintiffs in error to file abstracts, "in which they shall set forth the title of the cause, with the date of the filing of all papers in the court below, and a brief statement of the contents of each pleading, and shall set forth fully the points relied upon for the reversal of the judgment or decree."

It is further provided by said rule that:

"If the abstract filed shall not present the parts of the record to which reference is made in the assignment of errors, the appeal or writ of error may be dismissed."

We have not, in this case, exercised our privilege to decline to review this case because of the informality of the abstract, but, on the contrary, have examined the entire original record with much care.

1. If the judgment of the County Court was properly rendered, or if, because of the subsequent actions of the defendant, Ring, he is now estopped from questioning that judgment, then the District Court properly dismissed the appeal, and its judgment in that behalf must be sustained. The contentions of plaintiff in error made in this court are predicated upon the service of the summons issued by the County Court, which service he contends was absolutely void, and upon the failure of the County Court to sign its judgment in that case. The defect in the service of the summons, if any there was, was cured by the general appearance of the defendant in the County Court. In filing his motion to vacate the judgment, and his affidavit supporting the same, and his answer, he in no manner limited his appearance in the County Court, nor did he later, in the District Court, make a special appearance, nor did he make any attempt in the District Court to challenge the jurisdiction of that court.

The return of the sheriff on the summons reads as follows, after the caption:

"I do hereby certify that I have duly served the within summons, in the within stated action, on this 26th day of July, A. D. 1911, by delivering to and leaving with Mrs. J. G. Hollingsworth [the defendant's name appearing in the summons was J. G. Hollingsworth] (in Lincoln County) at the usual place of his abode, with his wife, a member of his family who is over fifteen years of age, the said defendant personally in the County of Lincoln, a copy of said summons.

W. G. LEWIS, *Sheriff*,
By Robert Papke, Deputy."

The above sentence does not conform to the most approved rules of good English, and may be, though we do not so decide, fatally defective, had timely objections been made thereto. But in addition to appearing generally, as above stated, Hollingsworth, in his motion to vacate the judgment, which he verified, states, among other things, that:

"At the time of the commencement of the above entitled action, and at the time of said pretended service of summons, this defendant was absent from the state of Colorado, and in the state of South Dakota, and did not return to the state of Colorado *until about the 28th day* of August, 1911, when for the first time defendant learned of said suit, and saw the summons in this case, *which the sheriff had served upon and left with the defendant's wife during the defendant's absence from Colorado.*"

In his brief defendant manifests some doubt as to the identity of Mrs. J. G. Hollingsworth, for he says therein, "Who is Mrs. J. G. Hollingsworth? There is nothing to show that she is the wife of the defendant. 'His abode.' I ask, whose abode? 'With his wife.' Whose wife. 'A member of his family.' Whose family?" From what we have quoted above from defendant's motion to vacate the judgment all doubt as to the identity of Mrs. J. G. Hollingsworth would seem to be set at rest. It is clear from the quotation from defendant's verified motion, above referred to, that he admits the service of the summons upon his wife.

2. The second contention of defendant, viz: that the judgment of the County Court is void because not signed by the judge of that court, is without merit.

"Courts at *nisi prius* usually render their judgments orally. The entry of such judgments in writing is made by the clerk. Look through the codes of procedure, criminal and civil, and note how rarely the court is specifically required to render its judgments in writing."—*Martin v. Simpkins,* 20 Colo. 438, 447, 38 Pac. 1092.

"There is no requirement of our code that a judgment or decree shall be signed by the judge."—*Eberville v. Leadville Co.*, 28 Colo. 241, 245, 64 Pac. 200, 202.

3. From the chronological data already given, it appears that the defendant made no move to vacate the judgment which was rendered against him by default in the County Court on August 29, until September 20. Section 1536 R. S. 1908, (same section M. & DeS.) provides that no appeal shall be taken from the County to the District Court from a judgment by default, or of non-suit, unless within ten days after the rendition of such judgment, application shall have been made to the court, by the party aggrieved, to set aside the same, and such application shall have been refused. If it be granted that in spite of this section of our statute, and in virtue of other statutory or code provisions, the court,

"May on motion, in furtherance of justice, relieve a party or his legal representatives from a judgment, order or other proceeding taken against him through mistake, inadvertence, surprise or excusable neglect,"

as plaintiff in error insists it may do. Still, under the showing made here, plaintiff in error is not entitled to relief, since, upon his own sworn admissions, he returned from the state of South Dakota on August 28th, the day prior to the rendition of the judgment, and that he *was then shown the summons in this case*, which evidently he ignored. We do not know when the defendant first learned of the rendition of the judgment, except he says in his motion to vacate same, that,

"Upon learning of the suit and alleged judgment after the same is alleged to have been rendered, this defendant was perfectly surprised,"

And in his affidavit in support of his motion to vacate, he says:

"This defendant had no knowledge or information that the alleged judgment had been rendered in this suit until

after said alleged judgment had been rendered in this case in favor of plaintiff and against defendant."

Construing the plaintiff in error's pleading most strongly against him, we must assume that he not only *saw the summons the day before the judgment was entered, but that he knew of the judgment immediately upon its rendition.* Therefore, his conduct in waiting twenty-one days before making any attempt to have the same set aside does not bring him within the rule which applies, or may under certain circumstances apply, to those against whom a judgment has been rendered, "through mistake, inadvertence, surprise or excusable neglect."

"The granting or denying a motion to vacate a judgment taken by default where service was had by publication is discretionary with the court, under Mills' Annotated Code, sec. 75. Such discretion is subject to review only when a gross abuse of discretion appears."—*Donald v. Brandt & Shipman*, 15 Colo. App. 414, 62 Pac. 580.

"Motions for relief from judgments under the provisions of Mills' Annotated Code, section 75, being addressed to the sound discretion of the trial court, unless it is clear that its discretion has been abused, appellate courts will not disturb its decision."—*Morrell Hdw. Co. v. Princess M. Co.*, 16 Colo. App. 541, 63 Pac. 807.

Under the authorities cited, and upon the facts disclosed by this record, which we have already pointed out, it can hardly be said that the County Court abused its discretion in denying the motion of Hollingsworth to vacate the judgment rendered against him in the County Court.

The District Court did not err in dismissing Hollingsworth's appeal; indeed, it could not properly have taken any other action. Having dismissed the appeal, the phrase appearing in the decree or judgment of the District Court to the effect that that court "affirmed the alleged judgment of the County Court" would seem to be surplusage.

Judgment Affirmed.

[No. 3975.]

GIBSON v. RIEHLE.

1. SPECIFIC PERFORMANCE—*Contract—Consideration.* Agreement for the exchange of lands. A promise of each to convey, is a consideration for the like promise of the other, sufficient to sustain a bill for specific performance. *Winter v. Goebner*, 2 Colo. App. 259, explained. (128)

2. —— *Mutuality—Conditional Agreement.* Agreement for the exchange of real property, conveyance to be made by each to the other, at a day and place stipulated, provided the property of plaintiff, on inspection, should prove satisfactory. The defendant having before the day appointed for the exchange of conveyances inspected the plaintiff's land, and declared himself satisfied therewith, the covenants thereupon became mutual, and plaintiff was held entitled to enforce specific performance (129, 130)

Error to the Denver District Court. HON. JAMES H. TELLER, Judge.

MR. CLARENCE J. MORLEY for plaintiff in error.

MR. WILLIAM A. BRYANS for defendant in error.

MORGAN, J.

The lower court sustained defendant's motion for judgment on the pleadings. Plaintiff brings error. The complaint was for the specific performance of a written contract for the exchange of real property owned by each of the parties, respectively. The answer admits the contract, pleads it *in hacc verba*, and alleges, that it is wholly without any valuable consideration, wholly without mutuality, and void, together with other defenses not now involved.

The consideration consisted in the respective promises and agreement to convey, by each party, upon conveyance by the other. Plaintiff's promise and agreement to convey was followed by a proviso, or condition, that defendant's property should prove, on inspection, satisfactory to him. This provision seems to have been inserted because plaintiff had not seen defendant's property at the time the contract was made. The complaint states, however, that, prior to the time set for performance, the plaintiff inspected defendant's property, and notified the defendant that the same was

satisfactory, and that, after so notifying defendant, plaintiff went to the place where it was agreed the contract was to be carried out, on the date agreed upon, ready and prepared to perform his part of the contract, and that defendant did not appear there, and afterward refused to perform his part of the contract; stating, also, that plaintiff is still prepared, able and desirous of carrying out the contract.

There are many reasons why a suit for the specific performance of a contract will not lie, when an action for damages, at law, for a breach thereof, may; but it is our intention to notice none of them except the two that are urged herein, to-wit:

First—Want of a valuable consideration; second, lack of mutuality because of the proviso—as to the plaintiff's promise to convey—that defendant's property should prove satisfactory, on inspection. The lower court based its judgment wholly upon the first, but it is contended here that its judgment should stand for the second reason. It is concluded that neither reason is available to support the judgment on the pleadings.

1. The promise and agreement to convey by each party, respectively, upon conveyance by the other, expressed in the written contract as the consideration for each party's agreement to convey the real property in exchange, was a valuable consideration. Bishop on Contracts (Enlarged Ed.) sec. 76. Parsons on Contracts (9th Ed.), p. 466 *et seq.* This being true, specific performance could be enforced, so far as the objection as to the consideration is concerned. Pomeroy on Specif. Perf. (2nd Ed.) sec. 57.

Under this contention, defendant in error relies upon the case of *Winter v. Goebner*, 2 Colo. App. 259, 30 Pac. 51, and, it seems, the lower court based its conclusion on the rule announced in that case. The court in that case used the words, "valuable consideration" as contrasted with a naked promise of nothing of value, or a voluntary promise or agreement; and while the court in that case, further said, "a promise

against a promise is not in this class of cases a good consideration," it used the word promise in the sense of a naked promise of nothing of value, against the same kind of a promise, or against a promise of a valuable thing on one side only. The court intended to say that the promises must be mutual, both of a thing of value, in this class of cases; so that either party to the contract may be entitled to the equitable relief of specific performance; thus carrying out the principle that a party coming into a court of equity must be prepared to do equity, and not be permitted to demand of another that which he could not be required to do on his part. 3 Pomeroy's Eq. Juris. (2nd Ed.) sec. 1404 *et seq.*

2. While the proviso, or condition, in the contract, that plaintiff's obligation depended upon his inspection of defendant's property, and upon its being satisfactory to him, may have destroyed the mutuality thereof at its inception, and, in effect, may have rendered plaintiff's promise to convey optional with him, and also made the contract unilateral and conditional in form, nevertheless, he alleges sufficient facts as above mentioned to remove this bar to mutuality, and to establish absolutely mutual engagement, prior to the time set in the contract for the complete performance thereof at which time the conveyances were to be made. It is true, it is the general rule, that the mutuality must be determined as of the time when the contract is executed, but there are several well defined exceptions to this general rule, and plaintiff's allegations, as above referred to, bring this contract directly within one of these. Mr. Pomeroy, in his work, says: "These exceptions are well established; many of them are common and familiar." Referring to that species of exceptions—"contracts unilateral in form"—he says: "Among the examples of this species are those contracts by which the party, upon whom alone an obligation arising from the express stipulations rests, covenants or promises to do or to forbear from, some specified act, upon the request of the other; and those by which the party making an offer, covenants or promises

to do or to omit some act, upon the assent or acceptance of the person to whom the offer is addressed, and those in which the party confers an *option* upon the other. The contracts of this kind are, in reality, conditional agreements. Upon the happening of the condition—that is, upon making the request, giving the assent, or declaring the option—they become absolute, and in many instances mutual in their obligation." Pomeroy on Spec. Perf. of Contracts (2nd Ed.) secs. 168, 169, and authorities cited in note (1), pp. 236, 7, where the authorities *contra* are also discussed. Fry on Spec. Perf. (3rd Ed.) sec. 465, p. 218, and note 4, where, illustrating, it is said: "Where a conditional contract had become absolute by the exercise of an option of purchase." See also Pomeroy's Eq. Jur. (2nd Ed.) sec. 1405, p. 2162, and note 1, p. 2163, distinguishing the general rule, the author quotes: "Where the plaintiff has already complied with the unenforceable condition, the objection of want of mutuality cannot be made." *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *Wilks v. Georgia P. R. R. Co.*, 79 Ala. 180; *Welch v. Whelpley*, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 110

While the foregoing authorities have met with some opposition, in the past, our courts seem to follow them quite directly. See *Gordon v. Darnell*, 5 Colo. 302; *Frue v. Houghton*, 6 Colo. 318; *Wood et al. v. Casserleigh*, 30 Colo. 287, 71 Pac. 360, 97 Am. St. 138; *Rude v. Levy*, 43 Colo. 432, 96 Pac. 560, 24 L. R. A. 91, 127 Am. St. 123.

So, where a written contract for the exchange of real property expresses the consideration as the respective agreements and promises to convey of both parties, upon conveyance by the other, specific performance may be enforced, other necessary elements appearing, although the promise and agreement to convey by one of the parties, who is the plaintiff, is followed by a clause expressing a condition that the property of the other shall, on inspection, prove satisfactory, if the plaintiff alleges and proves that he inspected the said property and accepted it as satisfactory and so notified the defendant,

all prior to the time set in the contract for the performance thereof, in the absence, of course, of any other obstacle otherwise than the two interposed herein, and disposed of by this opinion.

The judgment on the pleadings is, therefore, reversed, and the cause remanded.

[No. 3977.]

CARSON V. CUDWORTH, COUNTY TREASURER.

1. EVIDENCE—*Title to Lands—Receiver's Receipt.* A receipt for the purchase money of lands issued by the receiver of a land office of the United States is *prima facie* evidence of title to the lands therein described. (Rev. Stat. sec. 2494.) (133)

2. PATENT—*For Lands—Relation.* A patent for lands purchased of the United States relates to the entry, and is conclusive evidence of compliance by the entryman with all the requirements of the federal statutes. (133)

3. IRRIGATION DISTRICT—*Lands Held by Receiver's Receipt,* no patent having issued may be embraced therein. (135)

Error to Morgan District Court. HON. H. P. BURKE, Judge.

MESSRS. TAYLOR & PENDELL for plaintiff in error.

MR. C. C. RICKEL and MESSRS. STEPHENSON & STEPHENSON for defendant in error.

CUNNINGHAM, P. J.

Plaintiff in error, Carson, held a United States receiver's receipt for eighty acres of land in Morgan County, which receipt, issued to him on November 21, 1908, was recorded in Morgan County on December 31, 1908. This land lies within the boundaries of the Badger Irrigation district, organized February 17, 1909. Carson received a patent to the eighty acres on July 26, 1909. On October 24, 1911, he filed his complaint in the Morgan District Court for the purpose of restraining defendant in error, who was county treasurer of Morgan County, from making sale of said land for the delinquent irrigation tax for the year 1910. In his complaint Car-

son averred that he held the land under a receiver's receipt as stated above, and also alleged:

"That the Badger Irrigation District was duly organized and formed, and the organization thereof completed on, to-wit, February 17, 1909, that at the time of its organization plaintiff's interest in said described lands was evidenced by what is known as a receiver's receipt issued out of the public land office at Denver, Colorado, on to-wit, November 21, 1908, many months prior to the organization of said district, which said receiver's receipt is of record in the county clerk and recorder's office of Morgan County," etc.

The court sustained a general demurrer to plaintiff's complaint, and he brings the case here on writ of error. The sole question for our determination is presented in the following quotation from plaintiff's brief:

"Plaintiff contends that the irrigation act of Colorado covers only such owners of land as are owners in absolute fee simple, and that a holder of a receiver's receipt is not such an owner."

1. Plaintiff predicates his contention that lands held by a receiver's receipt can not be covered by the irrigation act and taken into an irrigation district upon the fact that in sections 3440, 3441 and 3442 R. S., such language as the following occurs:

"Whenever a majority of the *resident free holders owning land* in any district desires to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this act," etc.—Section 3440 R. S.

And again:

"For the purpose of the establishment of an irrigation district as provided by this act, a petition shall be filed with the board of county commissioners of the county * * * said petition shall be signed by a majority of the *resident freeholders* within said district."—Section 3441 R. S.

There is no allegation in the complaint that the plaintiff was not fully advised of all the steps leading up to the organization of the district, nor is there any averment that he in any wise protested or took any steps whatever to have his land excluded. Our attention has been called to no case or authority of any kind directly in point. Plaintiff concedes that lands held under a receiver's receipt are subject to taxation for state and county purposes; that they are subject to barter and sale, and that *they* may be considered as marketable title. The authorities are harmonious to the effect that a receiver's receipt is *prima facie* evidence of title, therefore, the plaintiff having plead that he held the land under a receiver's receipt (which receipt he set out in his bill *in hacc verba)* and the defendant having demurred generally to the complaint, it would appear that plaintiff's title, for the purposes of this case, must be conceded as sufficient.

Plaintiff must have represented to the government that he had in good faith complied with all of the requirements of the federal law prerequisite to the issuance to him by the government of the receiver's receipt, and his representations must have been relied upon by the government, else the receipt would not have issued. The only thing that could excuse the government, or relieve it from the necessity of issuing, in due time, a patent to the plaintiff, would be a discovery that the representations of plaintiff were false. He makes no contention here that he was not entitled to the receiver's receipt which he had received, and therefore to a patent, and it is not perceived how he could be permitted to so contend. Moreover, the patent having issued to him later on, as he avers in his complaint, it relates back to the date of the issuance of the receiver's receipt, and shows conclusively that he had complied with all the requirements of the federal statute prerequisite to the issuing of a receiver's receipt, and determines conclusively that his title at the time the district was organized was unassailable, even by the government. A receiver's receipt, regular in all respects, both as to its form and

the antecedent acts of the entryman leading up to it, has been held to be good as against a subsequent patent issued by the government. In *Simmons v. Wagner,* 101 U. S. 261, 25 L. Ed. 910, it is said:

"It is well settled that when lands have once been sold by the United States and the purchase money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. * * * Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent, if the right to it has become complete, are the mere ministerial acts of the officers charged with that duty."—*Barney v. Dolfe,* 97 U. S. 672, 24 L. Ed. 1063; *Stark v. Starrs,* 6 Wall. 402, 18 L. Ed. 925; *Stoddard v. Chambers,* 2 How. 284, 15 U. S. 124, 11 L. Ed. 269.

Our former Court of Appeals, in *Dallemand v. Mannon,* 4 Colo. App. 264, 35 Pac. 679, held that a receiver's receipt constitutes record title upon the margin of which the word "Homestead" might be entered, so as to give the owner the benefit of the homestead act.

2. Plaintiff cites and quotes at length from *Fallbrook Irrigation Co. v. Abila,* 106 Calif. 355, 39 Pac. 794. That case is not in point, for the reason that the receipt there under consideration was not a United States receiver's receipt, but was a receipt issued by the registrar of the state land office, and was issued to one who had entered into a contract to purchase certain state lands, upon which he had paid but 20% of the purchase price. Commenting upon the receipt in this case, the California court says:

"Certificates of purchase, under the United States land system, are not issued until the entire purchase money has been paid, and the cases arising under that system are not in point."

Plaintiff also cites and quotes at length in his brief from *Gourley v. Countryman,* 18 Okla. 220, 90 Pac. 430. While the Oklahoma court, in the Gourley case, does say that the certificate or receiver's receipt does not convey the entire estate, but conveys an estate less than a fee, it also says:

"But until patent does issue, the certificate carries with it to the purchaser the full equitable title, *with all the benefits, immunities and burdens of ownership.*"

If the federal government, as was said by Mr. Justice Field in *Stark v. Starr, supra,* in its dealing with the public lands, treats the right to a patent once vested as equivalent to a patent issued, we are unable to perceive why the state or any subdivision thereof dealing with such lands may not so regard and treat them.

Judgment Affirmed.

[No. 3993.]

KENNICOTT-PATTERSON TRANSFER COMPANY V. MODERN SMELTING AND REFINING COMPANY ET AL.

1. MECHANIC'S LIENS—*Contractor's Authority—Statute Construed.* Under Rev. Stat. sec. 4025, the principal contractor for the erection, alteration, or repair of any of the structures mentioned, and the sub-contractor as well, is the agent of the owner of such structure to employ labor for the purpose of the contract, and, he observing the statute, the premises are subject to a lien for the just value of the labor so employed. (137)

2. —— *Pleadings.* The complaint alleged plaintiff's employment by one West who was alleged to have been "the contractor" for the erection of the structure. In fact, during a portion of plaintiff's employment West was merely a sub-contractor under another. *Held* that the lien was not to be denied solely for this variance. (136, 137)

3. —— *Contract not Recorded.* When the contract price exceeds $500, and neither the contract nor any memorandum of it is recorded, as required by the statute (Rev. Stat. sec. 4025), all labor performed in the execution of the contract is deemed in law to have been performed at the instance of the owner. (138)

If in fact the contract is recorded the land owner if he would avail himself of the record must make it appear. It is a matter of defense. (138)

4. —— *Encumbrances—Rank—Burden of Proof.* The lien claimant asserting that an encumbrance is subordinate to his lien has the burden of proof. (138)

As to structures erected and improvements made after the record of a mortgage the lien of a laborer is superior to that of the mortgage. (139)

Error to Adams District Court. HON. CHARLES MCCALL, Judge.

MESSRS. STOKES & SHERMAN for plaintiff in error.

MR. C. W. FRANKLIN and MR. HARRY B. TEDROW for defendants in error.

KING, J., delivered the opinion of the court.

The plaintiff in error, as plaintiff below, brought its suit to recover judgment against the defendant N. West for labor performed at the instance and request of said West, to establish and enforce a mechanic's lien for the said labor as against the Modern Smelting and Refining Company, and to foreclose any rights which the defendant Powell, as subsequent encumbrancer, had or claimed in the premises of the Smelting Company. The complaint alleged that the said West was employed by the defendant company as a contractor for the construction and erection of a part of a smelting plant on said premises, and that, as such contractor, he employed the plaintiff. The lien statement as provided by statute was duly made, served and recorded by the plaintiff. Plaintiff had judgment against said West for the amount of its claim, but its complaint was dismissed as to the other defendants, and its right to a lien denied.

We are unable to determine upon what theory the trial court arrived at the conclusion that plaintiff was not entitled to a lien, and we know of no theory upon which the judgment can be sustained. It is clearly shown by the evidence, and, indeed, it is not disputed, that plaintiff performed the services as alleged, at the instance and request of the defendant West; that during all of said time, said West occupied the relation of a principal contractor, or sub-contractor, to the defendant company; that he was a principal contractor for the erection of a portion of said works, under a written contract, by which he was to receive the sum of $1,815; that thereafter he was

sub-contractor, under a written contract between the Vulcan Sheet Metal Company and the defendant Smelting Company, by which the Vulcan Company agreed to furnish and erect certain materials, machinery, etc., for the sum of about $3,500; during the time that plaintiff performed the labor and rendered the services for which the action is brought, it supposed that it was working directly at the instance and request of the Smelting Company, and made its charges for such services to the company direct; but on endeavoring to collect for the services rendered, learned that West was not connected with the company, except as contractor or sub-contractor.

The Mechanic's Lien Act, section 4580, Mills' Ann. Stats. 1912, section 4025 Rev. Stats. 1908, gives a lien upon the property, to every laborer, for his work done upon any building or other structure or improvement upon land, "whether done or bestowed at the instance of the owner of the building or other improvements, or his agent;" and further specifically provides that every contractor, sub-contractor or other person having charge of the construction, either in whole or in part, of any building or other improvement, shall be held to be the agent of the owner for the purposes of the act. Under these provisions, the defendant West, whether as principal contractor or as sub-contractor, was the agent of the owner; and for the purpose of maintaining this lien in favor of plaintiff, it is wholly immaterial whether the agency of West arose, in contemplation of law, from his relation of principal contractor, or as sub-contractor. As the statutory agent of the owner, he employed the plaintiff to perform the services and labor which he did perform, and thereby the liability of the Smelting Company to the plaintiff, for the purposes of a lien, was fixed, and the defendant company cannot escape its liability upon the sole contention that in bringing the suit the plaintiff failed to allege that it was employed a part of the time by West, as principal contractor, and the remainder of the time by West, as sub-contractor. Perhaps a

different question might arise upon the pleadings if the contractor and the sub-contractor had been different persons.

Furthermore, the evidence shows that the contracts for the work, between the owner and the contractors, were in excess of $500, and that such contracts were in writing, but it does not appear that either of the said contracts, or a memorandum thereof, was filed in the office of the County Clerk and Recorder of the county in which the property sought to be subjected to the lien, or any thereof, was situated; but it is shown that the contract between the defendant West and the defendant company was not recorded. The statute provides that in case such contracts or memorandums thereof are not filed, the labor done shall be deemed to have been done and furnished at the personal instance of the owner, and that the laborer shall have a lien for the value of his services.—Section 4580 Mills' Ann. Stats. 1912, section 4025 Rev. Stats. 1908. It was not incumbent upon the plaintiff to charge that such contracts, or a memorandum thereof, were not filed for record. If the defendant company, owner of the premises, wished to relieve itself from liability for the labor performed under such contracts, it was necessary that it should show that the contracts were in writing, and such contracts, or a memorandum thereof, filed for record. It is a matter of defense.—*Great Western Sugar Company v. Gilcrest*, 25 Colo. App. 1, 136 Pac. 553. The plaintiff maintained its right to a lien, whether by proof of labor performed at the instance and request of the statutory agent of the defendant company, or at the personal instance and request of the owner, by reason of its failure to comply with the requirements of the statute as to filing the written contracts.

The complaint alleged that the defendant Powell was the holder of an encumbrance upon the property upon which the lien was claimed, but that said encumbrance was subject to and inferior to the rights and lien of the plaintiff. Having alleged the Powell encumbrance, it was necessary for plaintiff to prove that it was inferior to its lien. In this respect, plain-

tiff failed to make a case against Powell. The only encumbrance in evidence is a mortgage, which is senior and superior to plaintiff's lien; and although there is some evidence tending to show that the note secured by the mortgage had been paid, the evidence in that respect is conflicting, and it may be assumed that the trial court found that the note had not been paid.

The judgment will be reversed and the cause remanded, with directions to the trial court to enter judgment in favor of the plaintiff, and against the defendant The Modern Smelting and Refining Company, in accordance with the prayer of the complaint; and against the defendant Powell as to the buildings, structures, erections and improvements made upon the lands described in the complaint after the date of the record of his mortgage encumbrance, and the machinery and fixtures used in connection therewith, and upon which the labor of the plaintiff was done and performed; but in favor of the defendant Powell to the extent that his mortgage encumbrance is a lien senior and superior to that of the plaintiff as to the land described in the complaint and the mortgage.

Reversed and Remanded.

Decided May 11th, A. D. 1914. Rehearing denied June 8th, A. D. 1914.

[No. 3895.]

THOMAS V. BOARD OF COUNTY COMMISSIONERS OF TELLER COUNTY.

COUNTY COURT—*Fees of Stenographer.* Under Rev. Stat. secs. 1562-1564 the Board of County Commissioners have exclusive control of the question whether a stenographer shall be appointed for the county court, and of his compensation. A resolution authorizing such appointment, and prescribing a monthly salary, "to be paid out of the 'County Judge Fee Fund'" not being assailed upon the ground that the statutory direction for a *per diem* was disregarded, was held valid in its entirety. A payment made by the county judge to the stenographer, in excess of the County Judge Fee Fund was held a voluntary payment and not to be recovered. *Airy v. The People*, 21 Colo. 144, and *Blanchard v. Chaffee County*, 15 Colo. App. 410, distinguished. (142, 143)

Error to Teller District Court. HON. JOHN W. SHEAFOR, Judge.

MESSRS. THEO. H. THOMAS and C. W. BLACKMER for plaintiff in error.

MR. G. P. NEVITT for defendant in error.

MORGAN, J.

Appeal by the plaintiff, the County Judge of Teller County, from a judgment against him in his action against the defendant, Board of County Commissioners, for $680, which he paid from his personal funds, to his stenographer, and for which the board has refused to reimburse him.

The action arose out of a misunderstanding between the County Judge and the board concerning the employment of a stenographer for the County Court, and payment for his services. No question was raised in the lower court as to the right of the County Judge to sue without an assignment from the stenographer.

The statute, secs. 1562, 3 and 4, Rev. St. 1903, provides that the County Judge may appoint a stenographer, "When in the opinion of the County Commissioners it shall be expedient or necessary;" and that "the board shall pass a resolution to that effect and certify the same to the County Judge," who may thereupon appoint a stenographer; and that "such reporter shall receive for his services such pay as the Board of County Commissioners may fix, to be paid from the treasury of the county, not exceeding ten dollars per diem, for reducing the testimony to shorthand, and not exceeding fifteen cents per folio of one hundred words, for making transcripts in long hand, when so directed by the court."

The commissioners passed the following resolution, January 10, 1905, about the time the County Judge assumed the duties of his office:

"Resolved, by the Board of County Commissioners, that it is expedient and necessary for the orderly and proper

transaction of the business of the County Court, to appoint and employ a shorthand reporter for the said County Court, who may also be appointed a deputy clerk of said court.

"Be it further resolved, that such reporter and deputy clerk shall receive for his services a salary not exceeding one hundred dollars per month, to be paid out of any funds belonging to the county judge fee fund."

No question was raised as to the fixing of the salary at not exceeding one hundred dollars a month, instead of "not exceeding ten dollars," etc., as the statute requires.

There is a conflict in the testimony, and a well defined dispute concerning the meaning, purpose and legal effect of the concluding clause of the resolution, "to be paid out of any funds belonging to the county judge fee fund," and the intention of the parties regarding the same. The County Judge contends that the concluding clause is mere surplusage and void, and that the intention was that the fees of his office should be used as far as they would suffice, to pay the stenographer, merely as a convenience, and not an absolute limitation as to payment. The county commissioners contend that the purpose of the clause was to limit the payment of the stenographer to such time and service as the fees of the County Judge's office would pay for, that is, funds derived from his office, over and above the salary of the judge and his clerk of the County Court; and that his services were to be discontinued when such fees were insufficient, and that such was the intention.

It is undisputed that the resolution was adopted as above set forth; that the stenographer was appointed and was paid by the County Judge, out of the fees of his office, for 1905 and a portion of 1906; that at the close of the year 1906, the County Judge ascertained that out of his personal funds he had paid the stenographer $680 more than the fees provided. Both parties concede that the board followed the requirements of the statute, except as to the concluding clause, aforesaid. The appellant contends that the concluding clause is

in violation of the statute, and cannot legally be relied upon by the board, as a defense against payment out of the county treasury of the $680 which the fees of the County Judge failed to meet, and which he paid, himself, to the stenographer, for services actually performed at the salary fixed by the board. The appellee contends, among other defenses, that the board had the power to so limit the compensation, and the services of the stenographer, by requiring payment out of the county judge fee fund, only, and that by said resolution the board legally and effectually so limited such compensation and services, and that the appellant is bound thereby.

As the statute gave the board exclusive authority in reference to the employment and compensation of the stenographer, and provided that such authority should be exercised by the adoption of a resolution, the parties are bound by that resolution, at least, by all valid parts thereof. Therefore, it is only necessary to determine whether the resolution is valid in its entirety. While it was irregular for the board to permit the County Judge to pay the stenographer for his services out of the fees of his office, yet such manner of payment is not in controversy here. Under the decision in the case of *Airy v. The People,* 21 Colo. 144, 40 Pac. 362, all fees received in excess of his own and his clerk's salary should be turned over to the county. Such excees fees thereafter belong to the county, and become a part of the general county fund. Sec. 2554 Rev. St. 1908. The proper way would have been for the County Judge to turn over to the county the excess fees, and let the claim for the stenographer's services be filed with the board for allowance, so that the board could pay the same to the stenographer by warrant on the general fund. Such irregularity, however, was not authorized by the resolution, but indulged in by both parties after the resolution was adopted, and for this reason it does not materially affect the controversy here. The resolution simply provided that the stenographer was to be paid out of that part of the general fund derived from the county judge fee fund to which the

county was entitled. So, if the stenographer's claim had been regularly filed, the board, in accordance with the resolution, would have allowed and paid it, so long as there was any excess from the fees of the County Judge's office belonging to the county to pay it with; and when the claim, which the County Judge now seeks to recover, was filed with the board, it was disallowed under the terms of the resolution, because no money was in the general fund derived from the county judge fee fund. Hence, it follows that the only question to be answered, here, is, did the board have the power to provide that the stenographer should be employed and paid for his services only so long as such fees were sufficient to meet the same. That the board so intended seems plain from the words of the resolution, and the court so found upon the conflicting testimony introduced to show the intention.

It is concluded that, as the statute gave the board full and exclusive power in the premises, it could lawfully limit the services and the compensation of the stenographer to such extent, only, as the money derived from the fees of the County Judge's office would provide payment. Such limitation was for the protection of the county, and it was reasonable, because, the decrease in such fees would reasonably lessen the expediency and necessity for such services. It is therefore held that, as to the contention here, the resolution was valid in its entirety; that the parties were bound by it; and that the payment of the $680 by the County Judge was wholly voluntary and cannot be recovered. To hold that such payment could now be recovered, would be equivalent to holding that the county could be required to pay for the services of a stenographer for the County Court not authorized by the Board of County Commissioners.

Our attention has been called to but two authorities to support the contention of the plaintiff—*Airy v. The People, supra,* and *Blanchard v. Chaffee County,* 15 Colo. App. 410, 62 Pac. 579; but there is nothing in either of these cases supporting plaintiff's contention. It is true, in the *Blanchard*

case, the court held that warrants drawn on the "sheriff's fee fund" were illegal, because, under the decision in the Airy case, they were not "drawn against any legal fund;" and that the court further held that such warrants, though void, were "evidences of indebtedness," that could be sued upon; nevertheless, the board did not have full and exclusive power over the employment and payment of the sheriff and his claims for mileage in that case, as it had over the employment and payment of the stenographer in the present case; the words "sheriff's fee fund" in that case were used in the warrants after allowance of the claims, while, in this case, the words, "county judge fee fund," were used in the resolution to limit the payment and the employment of the stenographer.

Judgment Affirmed.

[No. 3967.]

GIBSON V. HUFF.

1. EVIDENCE—*Objections to Testimony.* An objection that a particular matter offered in evidence is "incompetent, irrelevant and immaterial and not responsive to any issue in the cause," does not challenge the sufficiency of the answer under which the evidence is offered. (145)

2. PLEADING—*Waiver.* Plaintiff by replying to an answer does not waive the objection that it fails to state facts sufficient to constitute a defense. (145)

3. APPEALS AND ERROR—*Pleading Not Objected to Below.* An objection that a pleading does not state sufficient facts, though it may be raised in the court of review for the first time, is regarded with disfavor. (145, 146)

4. LIMITATIONS—*Payment of Taxes Under Color of Title,* must, to avail, be pleaded with exactness. A paper title, obtained in good faith, must be shown. (146)

Where the defendant fails to allege good faith in the acquisition of the title, or give any evidence of good faith, it is error to exclude evidence that the payment of taxes for a portion of the seven-year period was made under another and different deed than that relied upon in proof. Such testimony tends to prove lack of faith in the first title, and a transfer of faith to that subsequently acquired, which would change the date from which the seven-year period should be computed. (146, 147)

5. ——*Good Faith,* may be inferred from the conduct of the party. (148)

Error to Kiowa District Court. HON. C. S. ESSEX, Judge.

MR. JOHN F. MAIL for plaintiff in error.

MR. J. H. VOORHEES for defendant in error.

MORGAN, J.

Action in the lower court for possession of real property, begun April 1, 1911. Plaintiff alleged and proved title in himself. Defendant pleaded and proved, to the satisfaction of the trial court, his claim under the seven years' statute of limitation, sec. 4089, Rev. St. 1908, and had judgment. Plaintiff brings error.

The first assignment is that the court erred in admitting the tax deed offered by defendant as color of title, over plaintiff's objection that it was "incompetent, irrelevant, and immaterial, and not responsive to any issue raised in the cause." The evidence was competent, relevant and material, and responsive to the issue raised by plaintiff's replication, in the form of a general denial, to defendant's plea, aforesaid. If plaintiff intended to attack the plea because of insufficiency, he should have filed a general demurrer to it, or, objected to the introduction of the deed on the ground that the plea did not state facts sufficient to constitute a defense. By replying to the plea he did not waive the right to object to the introduction of the evidence on the ground that the plea did not state sufficient facts to constitute a defense; but, as the plea disclosed enough to show the statute relied upon, by replying, he thereby made the issue on the plea, and thus rendered the deed responsive to that issue. The objection therefore did not raise the question of the sufficiency of the plea, and there was no error in overruling it, and admitting the deed. The plaintiff raises in this court for the first time this direct question as to the sufficiency of the plea aforesaid on the particular ground that it did not state facts sufficient to constitute a defense, in that it did not plead *good faith*, and did not state what kind of title it was that was relied upon. Although this question, generally speaking, may be raised at

any time, it is not looked upon with much favor when raised for the first time in the higher court, and it will not be given any consideration now, except to say that, while it may be readily inferred from the plea that the seven years' statute of limitation was relied upon, nevertheless, it should have followed the statute and should have stated that the claim and color of title were made and obtained in *good faith* under a *paper title*. He who relies upon this statute must plead and prove with exactness the facts upon which it is based. *Brinker v. U. P. D. & G. Ry. Co.*, 11 Colo. App. 166, 55 Pac. 207; *Everbille v. Leadville T. M. & D. Co.*, 28 Colo. 241, 64 Pac. 200; *Webber v. Wanamaker*, 39 Colo. 425, 89 Pac. 780; *Upham v. Weisshaar*, 23 Colo. App. 277, 128 Pac. 1129; *Silford v. Stratton*, 54 Colo. 248, 251, 130 Pac. 327.

This question as to the defendant's pleading and proof is involved in the further contention that the court erred in refusing to permit the plaintiff to prove by the defendant, on cross-examination, that he paid the taxes for the last four years of the necessary seven, under and by virtue of a different deed and title than for the first three years. This contention emanated when it was elicited on cross-examinaton that defendant had taken several tax deeds on sales of the land for taxes made prior to the sale under which he obtained the deed introduced in evidence as his color of title, and also that he had purchased an outstanding tax title after he had been paying taxes for three years under the deed introduced aforesaid. Counsel for plaintiff, after eliciting these facts, asked him:

"Q. In 1906, when you paid the 1905 taxes, under which of these deeds did you pay it? Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception."

Then an offer was made by plaintiff's counsel to prove by the witness that he paid the taxes for the last four years, 1905 to 1909, not under the deed introduced and relied upon in the proof, which was taken in 1901, as color of title, but under the outstanding tax title he had purchased in 1905.

This offer was rejected, and exception allowed. This was reversible error, when considered in connection with the failure to allege good faith, and the absence of testimony from which good faith might be inferred or presumed. The plaintiff had the right to "put it to the test," and ascertain the fact as to whether defendant had so paid the last four years' taxes under a different title than the one under which he had been paying, and upon which he was relying in this action, as such admission on defendant's part would have tended to prove lack of faith in his first tax deed and an abandonment of his first title, and that he had transferred his reliance and his faith to the subsequently acquired title. If this were true, in its strongest import, it would change the date from which the seven years' time should commence to run under the statute, from the date relied upon under the first tax deed to the date of the payment of taxes under the subsequent title; and the later date was not seven years before the action was begun. Although a person may strengthen his title in such instances, by subsequently obtaining another title, yet he may not pay the taxes under the subsequent title, and rely entirely upon it and the payments under it, and, then plead and rely upon payments under a prior title, because, by so shifting his position, he loses his rights obtained by payments under the prior title. Whether plaintiff could have made his offer good and proved the fact is not for this court to say; on cross-examination, the witness should have been required to answer the question propounded, and the plaintiff should have been given the opportunity to prove that defendant had so shifted his position.

It is with some hesitation that this case is reversed, under the circumstances surrounding this error, but it is beyond the foresight or the prophecy of this court to assume or to foretell what the witness might have answered, or what the plaintiff could have proved by him. A reasonable probing of the defendant, on cross-examination, should have been permitted. He had failed to allege good faith in his plea of the statute,

and he said nothing in his testimony from which it might be directly inferred, or necessarily presumed; and while it is not intended to hold that good faith may not be presumed from his acts, it should have been pleaded, and a liberal cross-examination should have been allowed to ascertain the truth both as to his good faith, and as to which title he was actually relying upon.

Reversed.

[No. 3968.]

GIBSON v. STAGHORN CATTLE COMPANY ET AL.

1. NAMES—*Idem Sonans.* Newberry and Nuberry are *idem sonans.* (149)

2. JUDGMENT—*Pleading—Jurisdiction.* Even in alleging the judgment of a court of special jurisdiction the pleader is not required to state the facts which gave jurisdiction of the person. (Code sec. 71.) (150)

3. —— *Judgment Roll to Disprove Jurisdiction.* Where, in pleading a judgment the facts which conferred jurisdiction of the person are expressly alleged, *e. g.* that the defendant was "duly and legally summoned," the opposing party may, under a general denial, disprove this allegation by introducing the judgment roll. (149)

Error to Kiowa District Court. HON. C. S. ESSEX, Judge.

MR. JOHN F. MAIL for plaintiff in error.

MR. JOHN H. VOORHEES for defendant in error.

MORGAN, J.

Writ of error by the plaintiff in the lower court to reverse a judgment against him in his suit to quiet title to real property, filed October 26, 1910. All defendants except Christy filed a disclaimer; he filed a general denial and pleaded the seven years' statute of limitations concerning unoccupied lands, sec. 4090, Rev. St. 1908, and also a decree of the Kiowa District Court quieting the title in his grantor against certain defendants, among whom was plaintiff's immediate grantor. Replication by general denial. Plaintiff proved title in himself. Defendant introduced a tax deed as color of title, but failed to show payment of taxes for seven successive years.

He then introduced the decree, which was admitted over plaintiff's objections that it was not accompanied by the judgment roll, and that the defendant, plaintiff's immediate grantor, Newberry, was not a party because his name appears in the decree as Nuberry. The difference in the spelling of the name did not change the sound and was too infinitesimal to warrant the objection. As to the other ground, it is contended by the defendant in his brief and argument in this court, that, where a plea of a judgment is met by general denial, only, the judgment roll need not accompany the decree.

The plaintiff offered the judgment roll in evidence and the defendant objected to it because it was inadmissible under a general denial, and the objection was sustained. The roll so offered shows the decree invalid because of a defective affidavit of publication. It appears, therefore, that judgment has been obtained in this case based upon a void decree, and, the law and substantial justice demand that such judgment be reversed.

It has been repeatedly held by this court and the Supreme Court, from *Jansen v. Hyde*, 8 Colo. App. 38, 44 Pac. 760, to the latest announcement in *King v. Foster*, No. 3966, of this court, *ante* 120, 140 Pac. 930, and particularly in *McLaughlin v. Reichenbach*, 52 Colo. 437, 122 Pac. 47, that a judgment, when offered and "relied upon as an estoppel, as an adjudication upon the subject matter, or as establishing any particular state of facts of which it is the judicial result, can be proved only by offering in evidence a complete record, or a duly authenticated copy, of the entire proceedings in which the judgment was rendered." As to the particular contention, however, that this rule does not apply when the plea of the judgment is met by general denial, only, it is not an absolute necessity that such question be specifically determined, here, for the reason that the pleader in this case, in pleading the decree, stated that the "defendants were duly and legally summoned." Under the general rule as to pleading a judgment of a court of general

jurisdiction, and under the statute as to pleading a judgment of a court of special jurisdiction, (Sec. 71, Civil Code, Rev. St. 1908), it was not necessary for the pleader to state any facts conferring jurisdiction.—23 *Cyc.* 1527. But where the pleader goes farther and specifically states such facts, the opposing party may, under a general denial, disprove such allegation. Pomeroy's Rem. 2nd Ed., Sec. 630. Therefore, it was error for the lower court to prevent the plaintiff under his general denial, from introducing the judgment roll, which disclosed that the defendants were not duly and legally summoned, and thereby directly disproving such statement in the plea, and proving the decree to be void. The case must be reversed for this error, which obviates the necessity of specifically deciding the other point raised.

Judgment Reversed.

[No. 3971.]

KRIER V. MAYOR AND TRUSTEES OF THE TOWN OF WALSENBURG.

1. MUNICIPAL CORPORATIONS—*Ordinances—Validity.* A charter power to regulate and license legitimate and useful occupations does not include the power of prohibition. (153)

An ordinance prescribing the conditions under which theaters and moving picture shows shall be licensed and conducted, which assumes to make the granting of the license discretionary in the authorities of the town, is void. (153)

2. MANDAMUS—*Character of the Writ.* Mandamus, with us, is no longer a prerogative writ, but an ordinary civil action. The pleadings are controlled by the same rules which control other actions. The same measure of certainty and no other is required, and the statute of amendments applies to this as to other actions. (154)

3. —— *Parties.* Petition for mandamus requiring the town clerk to issue a license to the petitioner. It is not required that the mayor and trustees of the town be joined. (152)

4. PLEADING—*Averment on Information and Belief.* A petition for mandamus joined the mayor and trustees as defendants, under an averment that "plaintiff is informed and believes," that the officers named "claim the right to direct the said clerk," is incompetent for any purpose and should be stricken out on motion. (152)

Error to Huerfano District Court. HON. HENRY HUNTER, Judge.

MR. CHARLES S. THOMAS, MR. M. W. PURCELL, MR. FOSTER CLINE for plaintiffs in error.

MR. C. L. HENDERSHOTT, Town Attorney, and MESSRS. NORTHCUTT & MCHENDRIE for defendants in error.

CUNNINGHAM, P. J.

Krier, the plaintiff in error, filed his petition for a peremptory writ of mandamus, giving notice to respondents. The purpose of the petitioner was to require Mazzone, the City Clerk, one of the defendants in error, to issue to Krier a license to run a moving picture show in the town of Walsenburg. The petition sets up in full an ordinance of the town passed for the purpose of regulating the operation of picture shows. At great length, and with much particularity, the ordinance provides the mechanical conditions under which the business of moving picture shows may be operated in Walsenburg, and gives power to the chief of the fire department to examine such shows or theaters in order to see that the provisions of the ordinance are properly observed. Section 4 of the ordinance reads as follows:

"Any person or company who shall in any manner engage in the business of conducting a moving picture show or theater in the town of Walsenburg shall be required to pay a yearly license of $100. Said license to be obtained from and issued by the town clerk and recorder."

According to the averments of Krier's petition, on the 30th day of September, 1911, he appeared before the Town Clerk and paid to him the sum of $100, as and for his license fee, and requested the clerk to issue a license to him, permitting him to operate a picture show. This the clerk neglected and refused to do, notwithstanding Krier, according to the allegations of his petition, has been at all times ready to operate a picture show, strictly in accordance with the conditions of the ordinance. In the 4th paragraph of the petition, plaintiff in error alleges:

"That by virtue of said ordinance [which had been previously set forth *in haec verba* in the petition] the respondent, C. Victor Mazzone, the Town Clerk of the town of Walsenburg, was on the last mentioned date, the proper and only officer of the town of Walsenburg who was clothed with the right and duty to issue licenses for operating the business commonly known as a moving picture show."

The respondents, other than Mazzone, were made such by the petitioner, evidently because they were members of the city council, for in the petition it is averred:

"That the petitioner is informed and believes, and therefore alleges the fact to be that the other respondents named, as Mayor and the Board of Trustees of the town of Walsenburg, do claim the right to direct the said Town Clerk to issue or refuse to issue a license in accordance with the terms of said ordinance."

We shall presently consider the allegation above quoted. All of the respondents joined in a common demurrer to the petition, which the court sustained, on argument, and dismissed the petition at the cost of petitioner, from which judgment the case is here on writ of error for review.

There were various grounds set forth in the demurrer, but the court sustained the same, apparently, upon the theory that the petition did not state facts sufficient to constitute a cause for the relief sought by the petitioner, and upon the further theory that "the granting or issuing of said license, or any license, is discretionary to these respondents, and can not be compelled by mandamus."

In the view we take of this case, it was not necessary to join the Mayor and members of the City Council. Indeed, the averment in the petition by which they were made parties being upon information and belief, and even in this manner averring no issuable fact, but simply stating that "the plaintiff was informed and believed that these officers claimed the right to direct the said town clerk," was not competent for any purpose, and had a motion been made to strike the same from

the petition, it ought to, and doubtless would, have been granted. We can not agree, however, with the contention of counsel for respondents that by reason of this immaterial allegation, and because it was made upon information and belief, the whole petition was so fatally defective as to warrant the judgment of dismissal rendered by the trial court.

Having fully complied with the ordinance regulating the issue of a license for a business not inherently dangerous to the peace and good order of the city, petitioner was *prima facie* entitled to receive the same. If there exists valid reasons for withholding from petitioner the right to engage in the business for which he seeks a license, no hardship can result to respondents by requiring them to disclose the same.

"The power delegated to a municipality to regulate and license a legitimate and useful occupation does not include the power to prohibit absolutely."—25 *Cyc.* 603.

Had the ordinance attempted to make the granting or issuing of a license, under the circumstances of this case, (as it did not) entirely discretionary to these respondents, it would have been void, under the ruling in *Phillips v. Denver*, 19 Colo. 179, 183, 34 Pac. 902, 41 Am. St. 230; *Curran Co. v. Denver*, 47 Colo. 221, 107 Pac. 261, 27 L. R. A. (N. S.) 544.

The argument made on behalf of respondents touching the defects in the petition proceeds largely upon the erroneous theory that the pleadings in a mandamus proceeding are highly technical, and that the writ of mandamus is a prerogative writ. Such was the rule at common law, and this rule perhaps is still adhered to in some of the code states, but not in our own.

"At common law mandamus was a prerogative writ, and it is still a prerogative writ in some states. In other states it has now lost its prerogative character and does not issue by virtue of any prerogative power, but is nothing more than an ordinary action at law, in cases where it is the appropriate remedy."—13 Enc. Pl. & Pr. 492.

"An applicant for mandamus must plead his facts with the same certainty, neither more nor less, than is required in ordinary actions at law."—26 *Cyc.* 429, 430.

"The writ can not be quashed for any matter involving the merits, nor because of a formal defect capable of amendment."—Id. 463-4.

"The general statutes on amendments are applied to mandamus proceedings as to other civil remedies or actions between the parties. * * * And defects which might have been cured if objection had been made in apt time will be taken to have been cured by amendment."—Id. 468-493.

"The provisions of our law in relation to mandamus in the *nisi prius* courts are found in a chapter of the civil code, and there is no reason why the liberal rules of procedure and amendments governing other civil actions instituted thereunder are not applicable to a proceeding in mandamus."—*Denver School Dist. v. Arapahoe School Dist.* 33 Colo. 43, 78 Pac. 690.

"A mandamus is no longer regarded as a prerogative writ. Its form, tenor and purpose, and perhaps it may therefore be said many of its objects, are totally different from those which obtained when the writ was first devised. This position could be easily sustained by a reference to the authorities."—*People v. Rio Grande County*, 7 Colo. App. 229, 42 Pac. 1032.

"There is no necessity for greater accuracy in the statement of the petitioner's claim [in a mandamus proceeding] than would suffice as a statement of his cause of action in an ordinary pleading. In other words, a petition for mandamus is to be construed in the same way and subject to the general rules applied in the construction of an ordinary complaint. The certainty to a certain intent in every particular is no longer a prerequisite. Substantial accuracy is all that is necessary."—*People v. Rio Grande County, supra.*

Other contentions raised and debated in the briefs, and which have received our consideration, do not appear of sufficient importance to warrant discussion.

The judgment of the trial court is reversed, and the cause remanded for further proceedings in conformity with the views herein expressed.

Reversed and Remanded.

[No. 3976.]

MILWAUKEE GOLD MINING COMPANY v. TOMKINS-CRISTY HARDWARE COMPANY.

1. MECHANIC'S LIENS—*Mining Property.* Mechanic's liens asserted against mining properties are governed by the same rules which control liens upon real property of other character (Rev. Stat. sec. 4028). (158)

2. —— *Improvements by Lessee.* A lease and bond of a mine containing no provision for the erection of buildings, or for any improvement save that incidental to active mining, does not authorize the lessee to impose a lien upon the premises for materials furnished for enlarging and equipping a mill situate thereon. *Clark Co. v. Centennial Company*, 22 Colo. App. 174, explained. (160)

3. —— *Improvements Made With Owner's Knowledge.* One seeking to enforce a lien under Rev. Stat. sec. 4029 for improvements made with the knowledge of the owner, must both allege and prove such knowledge, and further that the materials for which the lien is claimed were furnished to be used in the particular improvement in question, and notice to the owner of such intended use. (161)

An allegation that "at the time of furnishing said supplies defendant had full knowledge and notice thereof" is not sufficient. (161)

4. ——*Lien for Material.* One seeking to enforce a lien for material must prove a mutual understanding existing at the time of the delivery, that the material is to be used for the particular structure or improvement in respect of which the lien is claimed. (158)

Error to the Dolores District Court HON. CHARLES A. PIKE, Judge.

MR. C. L. WATSON for plaintiff in error.

MESSRS. ADAMS & HOGG for defendant in error.

KING, J., delivered the opinion of the court.

This action was brought by The McFarlane Manufacturing Company to establish and foreclose a mechanic's lien upon

the property of the defendant, The Milwaukee Gold Mining Company. The defendant, The Tomkins-Cristy Hardware Company, filed its cross-complaint, praying that it be adjudged a first and prior lien upon said property for materials furnished, and that said lien be foreclosed. Upon this cross-complaint and the reply of The Milwaukee Gold Mining Company, the cause was tried and judgment rendered in favor of the cross-complainant. To reverse the decree in so far as it adjudges a lien against its property, The Milwaukee Gold Mining Company brings the case here on error. For brevity, The Tomkins-Cristy Hardware Company, defendant in error, will be designated "the plaintiff;" The Milwaukee Gold Mining Company, "defendant;" The Smuggler-Almont Gold Mining Company, the "Smuggler-Almont Company."

The property on which the lien is claimed is a group of lode mining claims and a millsite in Dolores county, owned by the defendant. The lien is claimed on account of certain materials alleged to have been sold and delivered by the plaintiff to the Smuggler-Almont Company, to be used, and used, in improving the mining claims and millsite. The cross-complaint, hereinafter called the complaint, contains two counts or causes of action. The first count predicates the right to a lien against the property of the defendant upon the theory and allegation that said company expressly authorized and directed the Smuggler-Almont Company to make the improvements. The second count is identical with the first, except that it predicates the right to a lien upon the theory and allegation that the defendant, the owner of the property, had full knowledge of the furnishing of the materials, but failed within five days thereafter to give notice in any manner that its interest in the premises should not be subjected to a lien therefor. The defendant's reply put in issue all material allegations of the complaint, except its ownership of the mining property and the recording of the lien statement, and certain other purely formal allegations, which were admitted.

The evidence upon which, together with the pleadings, the judgment for plaintiff was based, was furnished by the testimony of Richard Kellar; the only witness sworn. He was the president and manager of the Smuggler-Almont Company, and stated that at the times mentioned in the pleadings, that company was operating, under a bond and lease, the Smuggler-Almont mine; that such bond and lease was between the Milwaukee Company and William Wittle, and assigned by said Wittle to the Smuggler-Almont Company; that witness bought, for his company, mine and mill supplies from the Tomkins-Cristy Company amounting to $965.36, which had not been paid for; that said material was used upon this property, the largest part of it for the enlarging and equipping of a mill, but a part of it went into the mine; that the work done consisted chiefly of cleaning up and developing the mine, retimbering, laying new track, doing new development work, and mining ore. Plaintiff offered in evidence a certified copy of the record of what purported to be a bond and lease from the defendant to the aforesaid Wittle, and the assignment thereof to the Smuggler-Almont Company. The instrument was not acknowledged, and there was no other proof of its execution, nor of the execution of the transfer, but over proper objection made by defendant, the instrument and the transfer were admitted.

The court overruled defendant's motion for non-suit made upon the ground that the complaint did not state facts sufficient to constitute a cause of action against it, and that the evidence was insufficient to sustain the judgment, and entered a decree establishing the lien and ordering its foreclosure.

Conceding, but not deciding, that the complaint stated a cause of action, we think the evidence wholly insufficient to support the decree.

1. There is not a scintilla of evidence to show that the plaintiff, being a materialman, at the time it furnished the materials and supplies, knew that the same, or any thereof,

were to be used in, about or upon the property or premises of the defendant company. If such was the case, it was incumbent upon the plaintiff to produce evidence thereof at the trial. There is no evidence to show that the supplies were not furnished or sold by the plaintiff relying wholly upon the credit of the Smuggler-Almont Company, except that a portion of the supplies were furnished upon the personal guaranty of Kellar, the president and manager of said company. The provisions of section 4028 R. S. '08, 4583 M. A. S. 1912, applying to liens on mining property are governed by the same rules that apply to a lien upon other property.—*Wilkins v. Abell,* 26 Colo. 462, 58 Pac. 612. The general lien act provides:

"* * * Materialmen * * * furnishing materials *to be used* in the construction, alteration, addition to or repair of any building * * * or any other structure or improvement upon land * * * shall have a lien upon the property upon which they have * * * furnished materials," etc.

It seems to be quite uniformly held that under this and similar statutes, it is necessary to prove that at the time the material was furnished there was a mutual understanding between the materialman and the contractor that the material was furnished to be used in the construction of a particular building or the improvement of certain property; or, at least, that there was such understanding upon the part of the materialman, and in the absence of such proof, the lien cannot be sustained.—*Tabor-Pierce Lumber Co. v. International Trust Co.,* 19 Colo. App. 108, 75 Pac. 150; *Roebling v. Irrigation Co.,* 99 Cal. 488, 34 Pac. 80; *Rice v. Cassells,* 48 Colo. 73, 108 Pac. 1001; *Salzer Lumber Co. v. Lindenmeier,* 54 Colo. 491, 496, 131 Pac. 442; *Johnson v. Simmons,* 123 Ala. 564, 26 South. 650; *Chapin v. Papier Works,* 30 Conn. 461, 79 Am. Dec. 263; *Colorado Iron Works v. Riekenberg,* 4 Idaho 705, 43 Pac. 681; *Wendt v. Martin,* 89 Ill. 139.

2. We think the court erred in admitting in evidence the certified copy of the record of the alleged bond and lease. The certified copy furnished no competent evidence that the instrument had been executed by the defendant, and no other evidence of its execution was offered. Its admission contravened the rules of evidence at common law and of our statute, which to some extent is a relaxation of the rule of common law. The statute provides:

"Deeds, bonds and agreements in writing, for the conveying or incumbering of real estate, or any interest therein, shall be deemed from the time of being filed for record, notice to subsequent purchasers or incumbrancers, though not acknowledged or proven according to law, *but neither the same, nor the record thereof, shall be read as evidence, unless subsequently acknowledged or proved according to law, or unless their execution be otherwise proved in the manner required by the rules of evidence* applicable to such writings, so as to supply the defects of such acknowledgment or proof."

—Section 696 Rev. Stats. 1908, 838 M. A. S. 1912.

The evidence offered should have been rejected. Without it, there is no proof of contractual relations between the defendant and the Smuggler-Almont Company upon which to predicate an agency in the latter company for the former that would support a lien upon defendant's property for goods furnished by the plaintiff at the instance and request of the Smuggler-Almont Company, and for that reason, if for no other, there is a failure of proof to support the first cause of action. The materials are not shown to have been furnished at the instance of the owner of the property or its agent. But if the execution of the bond and lease had been duly proved, so as to be considered in evidence, we think that fact would not affect our conclusion as to the first cause of action. An examination of the instrument discloses that it is an ordinary mining lease, with an option to purchase, providing for development work in general, but with no pro-

visions for specific buildings or other permanent improvements except the work done in the usual operation of an active mine. The relation of vendor and vendee is not thereby created. The right to a lien for materials furnished to the lessee, comes clearly within the authority of, and is denied in, *Wilkins v. Abell,* 20 Colo. 462, 58 Pac. 612; *Antlers Park R. M. Co. v. Cunningham,* 29 Colo. 284, 68 Pac. 226; *Williams v. Eldora-Enterprise G. M. Co.,* 35 Colo. 127, 83 Pac. 780. There seems to be a misconception of the meaning and effect of the decision of this court in *Clark Hardware Co. v. Centennial T. M. Co., 22* Colo. App. 174, 123 Pac. 322, as to the right to maintain a lien on the property of a lessor, for material furnished to a lessee and by him used in making improvements on said property. That decision, so far as it held the lessor's property subject to a lien, was predicated wholly upon the provisions of section 5, chapter 118, Session Laws of 1899, section 4029 Rev. Stats. 1908, 4584 M. A. S. 1912. The complaint in that case alleged that the materials were furnished and used for the working and preservation, prospecting and developing of certain mining property, thereby enhancing its value, *with the knowledge of and notice to the owner,* and that, notwithstanding such knowledge and notice, the owner did not give notice that the property should not be subject to a lien. As against a general demurrer, those allegations were held sufficient to constitute a cause of action for a lien under the provisions of the foregoing section. The existence of the relation of lessor and lessee as between the owner of the property, and the person to whom the materials were furnished was but an incident in that case, and in no manner affected the right to the lien under the pleadings attacked by the demurrer. It was not the intention of the writer of that opinion, nor of the court, to hold that the mere relation of lessor and lessee is of itself sufficient to subject the interest in real estate belonging to the lessor to a lien on a contract for labor done or materials furnished to or at the instance of the lessee. That such was not the view of

the court is shown by our later ruling in *Fisher v. McPhee & McGinnity Co.*, 24 Colo. App. 420, 135 Pac. 132.

3. The defendant in error contends that the lien can be sustained under the second cause of action. The statute upon which this cause of action is predicated has been construed by this court in *Fisher v. McPhee & McGinnity Co., supra.* It provides that improvements made upon land *with the knowledge of the owner* shall be held to have been made at his instance and request, to the extent that the land shall be subject to a lien for such improvement, unless the owner shall, *within five days after he shall obtain notice* of the improvement, give notice that his interest shall not be subjected to a lien for the same, in the manner provided in said statute. It is further provided that the provisions of said section shall not apply to any owner who shall have contracted for such improvement.—Session laws 1899, page 261, section 5, 4029 R. S. '08, 4584 M. A. S. 1912. There is no allegation in the second cause of action that the defendant had knowledge or notice of the making of the improvements on its property, or that the materials furnished by the plaintiff were used in the construction, alteration or repair of any buildings, structures or other improvements on its property. The complaint alleges that "at the time of furnishing said hardware, mill and mine supplies, defendant had full knowledge and notice thereof." This allegation is defective, but, conceding it to be a sufficient allegation to bring the plaintiff and defendant within the terms of that section of the statute, no testimony was offered to show that defendant had such knowledge or notice, and nothing from which such notice can be inferred. Furthermore, we are of the opinion that in order to sustain a lien under this section in behalf of a materialman, it must be shown that the materials were furnished to be used in the building or other structure or improvement upon the property sought to be charged with the lien, and with the knowledge or understanding that they were to be so used, and credit thereby

given to the property into which they were to be wrought or incorporated, as well as to the purchaser.

Reversed.

[No. 3994.]

HUGHES v. KERR ET AL.

1. APPEAL AND ERROR—*Harmless Error.* An agreement between plaintiff and defendants provided that upon sales of land made by defendants to parties directed to them by plaintiff, plaintiff should receive two-thirds of all profits made. Defendants, dealing with one McClure, sent to them by plaintiff, sold to him certain of their own land, but as they asserted, were required, in order to affect the sale, to take in exchange lands of McClure, at an excessive valuation; that they traded these for other lands, which they afterwards sold, gaining in the three transactions no profit at all. The court charged that the defendants were not justified in denying plaintiff "his share of the profits on account of the McClure trade, unless he was a party to the last two transactions, *provided always profits were made.*" *Held,* that though the words italicized, not being clearly limited to the transaction with McClure, made the instruction ambiguous, the error was not sufficient to justify a reversal. (163, 168, 169)

2. —— *Questions not presented below,* will not be considered, *e. g.* failure to instruct where no instruction is prayed. (171)

3. PRINCIPAL AND AGENT—*Liability of Agent for Acts or Representations of Associate.* Defendants had agreed with the plaintiff to allow him a share of the profits on all lands sold by them to any person directed to them by plaintiff, and plaintiff had agreed to "deal with no other person," etc. Plaintiff demanding a share of the profits alleged to have been made by defendants in a sale to one McClure, who resided in Kansas, it appeared that one Baker, who was associated with plaintiff, and who also resided in Kansas, had on the occasion of McClure's visit to Colorado, at the time of his purchase, recommended to him to see another firm of land agents, who he stated, were more reliable than defendant. The court charged that in this Baker was guilty of bad faith, and "being the agent of plaintiff, such act was the act of plaintiff, and he thereby forfeited all rights to profits, upon the sale to McClure."

It appearing, that while Baker was acting as the representative of plaintiff, he was also acting in an independent capacity, as the agent of others, and among them McClure, the instruction was prejudicially erroneous, because assuming that in the statement imputed to him Baker was acting as the agent of plaintiff, and because even though Baker was in fact acting for plaintiff, in making the statement attributed to him, it was not to be conceded as matter of law that plaintiff, though Baker acted without his consent, knowledge or ratification, forfeited his right to share in the profits in the sale made to McClure. (169)

4. ADMISSIONS—*In Pleading.* The answer conceded that plaintiff was entitled to a sum named, and offered to permit judgment for that amount. This offer was afterwards withdrawn, the admission however remaining. *Held,* that upon this admission, and matters in proof, plaintiff was entitled to a directed verdict for the amount admitted. (171)

Error to Rio Grande District Court. HON. CHAS. C. HOLBROOK, Judge.

MR. JAMES P. VEERKAMP for plaintiff in error.

MR. JESSE STEPHENSON for defendants in error.

KING, J., delivered the opinion of the court.

Suit was brought by plaintiff in error, hereinafter designated as plaintiff, to recover from defendants compensation for services performed as a real estate agent in procuring a purchaser for land offered for sale by defendants.

The suit is based upon a written contract dated March 23, 1910, in which defendants were parties of the first part, and plaintiff was a party of the second part. It provided, in substance, that upon any sales of land made by parties of the first part, to any person directed to them by the second party, he should receive from the first parties *two-thirds of all profits* over and above the price of lands owned by first parties, held by them upon option, or listed with them for sale, and that "all profits, either in cash, notes, stock or lands, shall belong to and shall be turned over to each party of this contract immediately after such sales are closed. All earnest money shall be divided in the above same manner." It was further provided that the second party was to pay all of his own traveling expenses, and deliver buyers to the first parties free of charge, and that the first parties were to give the second party a net price of all lands owned by them, listed with them for sale, or upon which they had options. The agreement also contained the following provision:

"It is further agreed that party of the second part is to deal with no other agency in the San Luis Valley during the life of this contract, but to deal exclusively with the parties of the first part."

The contract was to remain in full force for twelve months from its date, unless cancelled by mutual consent of the parties.

The complaint alleged that pursuant to the contract, plaintiff procured and directed to the defendants, to purchase land, one A. L. McClure, who was accompanied to the defendants at their place of business, and introduced to them by plaintiff as a prospective buyer of land, and that afterwards, as a result of plaintiff's efforts in directing and introducing him to the defendants, they sold him certain lands for $16,000; that defendants named to plaintiff as the net cost or price of said land the sum of $12,000; that the profits realized for such sale was $4,000, of which plaintiff claimed two-thirds, or $2,666.66; that defendants had offered to pay plaintiff $416.66, and no more. Defendants admitted the contract; that plaintiff accompanied said McClure to defendants' place of business and introduced him as a prospective land buyer; that defendants sold to said McClure a parcel of land belonging to defendant Graves, and that the price of said land mentioned and agreed upon in the sale was $100 an acre, or $16,000; but alleged that the sale was made by taking in exchange a half-section of land in Kansas, belonging to said McClure, at a price greatly in excess of its real value, and that for the purpose of making the trade they placed an excessive or inflated value upon their own land; that its real price or value, and the price listed with plaintiff was $80 an acre, and that no *profits* were made upon the sale or exchange; admitted that they offered to pay plaintiff a commission upon the basis of $5 an acre for the land sold, after deducting certain expenses, offered to permit judgment for the plaintiff in the sum of $441.66, and asked that judgment for that sum be entered in favor of the plaintiff; but denied generally all other allegations of the complaint, and alleged that plaintiff had violated the contract long before said sale to McClure; that at the time the sale was made, said McClure came to the town of Monte Vista, where defendants were doing business, in company with other real estate agents in no way connected with the plaintiff. The new matter in the answer was put in issue by replication. Upon a verdict of the jury, judg-

ment was rendered in favor of the defendants, from which plaintiff sued out his writ of error.

The assignments of error pertain chiefly to instructions of the court, the correction of which will require consideration of the evidence.

Plaintiff was a real estate agent or broker, with headquarters at Denver. He had an Eastern connection at Grainfield, Kansas, where he was represented by a real estate agent named Baker. Defendants were located and had an office at Monte Vista, Colorado, in the San Luis valley. A. L. McClure owned a farm near Grainfield, Kansas. Through the efforts of plaintiff and said Baker, McClure went to Denver, and was taken to the San Luis valley, and introduced to defendants by plaintiff. It was McClure's purpose, communicated to the defendants, to make an exchange of his farm in Kansas for lands in Colorado. No trade was made at this visit; McClure returned to Kansas. Later in the year he returned to Denver, intending to go to Monte Vista, but plaintiff could not go with him at that time, but telephoned the defendants that McClure was coming to see them. McClure, however, returned to Kansas. Not long after, he returned to Colorado, but did not at that time see the plaintiff. He went to the San Luis valley with real estate agents located at Colorado Springs, known as the Haigler Investment Company, who tried to sell him some lands listed with them, but not including the lands which he afterwards bought; not being pleased with the lands offered by the Haiglers, McClure went to the office of the defendants, reopened negotiations for the exchange of his land as on his first visit; after making a price upon his land of twenty-five dollars an acre, and receiving an offer of defendants' land at $100 an acre, and after defendant Graves had gone to Kansas with McClure and inspected his land, the exchange or sale set forth in the pleadings was effected on the basis of the values aforesaid. Soon thereafter plaintiff was notified by said Baker of this sale, and later by defendants, who notified plaintiff that as

soon as the deal was thoroughly closed they would settle with him for two-thirds of the profits. After the trade between McClure and Graves was concluded, defendants traded the Kansas land for other land, which they thereafter sold, and contend that in the three trades made they lost money, instead of making a profit, and therefore plaintiff was entitled to no compensation for his services. Defendant Kerr, however, testified that they had told plaintiff that he would not be asked to deal on less than five dollars an acre, and for that reason they put the profits at $800, and offered to pay plaintiff on that basis, after deducting $137.50 which they had paid to Baker—one-half of a commission claimed by him as agent for McClure, and which they paid upon some agreement made between defendants and McClure.

As a sample of the evidence upon which the instructions to be considered were given, we quote from the testimony of defendant Kerr:

"Q. Didn't you try to keep this deal from Mr. Hughes? A. No, sir; Mr. Hughes was in our office in March, when Mr. McClure was there, and knows that this deal was pending; and about the trouble between the commission of Mr. McClure and Mr. Baker; and he sent several telegrams right in our office regarding it.

Q. Then Mr. Hughes really knew that this deal was going on, and you regarded it all the time, that he was Mr. Hughes' man, in making this deal? A. Yes, sir.

Q. And if there was a profit, he was entitled to two-thirds? A. Yes, sir.

Q. Your contention is that there was no profit? A. Yes, sir. * * *

Q. You notified Mr. Hughes? A. Yes, sir.

Q. You knew that Mr. Hughes had quite an interest in this matter? A. Yes, sir.

Q. And you know, if there was any profits, that he was entitled to two-thirds of it? A. Yes, sir; whenever it is due.

Q. And you owe it under this contract? A. Yes, sir; if there is anything due, he is entitled to two-thirds of it.

Q. And you say you sold the Kansas land for more money than you gave for it? A. I said that there was three trades in one. It was put in at more money, but I can say that we did not realize a dollar."

In closing up the transaction, defendants took McClure's secured notes for an amount approximating $1,500, which Kerr stated was the difference between encumbrances on the respective parcels of land.

McClure was offered as a witness for plaintiff, and during the cross-examination testified as follows:

"Q. Then the second—or the time you did trade for the land, did you come to Denver, or Colorado Springs first? A. I came to the Springs, yes, sir.

Q. Did Mr. Baker come with you, or did you come alone? A. I came alone.

Q. What people did he send you to see at Colorado Springs? A. The Bill Haigler Company.

Q. The Haigler Investment Company? A. Realty company.

Q. It is this Billy Haigler, this man that the people call Billy Haigler, that goes around to herd the folks? A. I expect.

Q. Do you know that he is the same man? A. I did not see the old man when I came out.

Q. You came with his people, that is, the agents in Colorado Springs, did you? A. I came with them.

Q. Why did Mr. Baker say he was sending you there? A. He said he had a notion to quit Kerr & Company, but I don't say that he did, or anything of that kind. He said that he thought the Haigler people was a little more reliable people.

Q. And then he recommended you to come out to Billy Haigler's, did he? A. Yes, sir.

Q. And then you got with the Haiglers' agents down to Monte Vista, did you? A. Yes, sir; I came to Monte Vista.

Q. With the Haiglers? A. Yes, sir. * * *

Q. You didn't go to Mr. Kerr's office that morning, did you? A. No, sir, I did not. * * *

Q. What land did they (the Haiglers) show you? A. They showed me some deeded land. Of course, I told them that I wanted a place that was fairly well improved, so I could move onto it and it would be all right; and they showed me a couple of state leases. They did not say it was a state lease until they came back to the office, and I says, 'I supposed you had—you was describing some deeded land to me; something that you could put up a warranty deed,' I said. 'If you haven't got it, gentlemen, you can take me back to Monte. I am through with it.'

Q. Did you come back? A. Yes, sir.

Q. And then you went and traded with Mr. Kerr? A. Yes, sir.

Q. When you saw Mr. Kerr, now, then, you had come on that trip from Colorado Springs with the Haigler outfit? A. Yes, sir; I did.

Q. And not with Mr. Hughes, had you? A. I was not with Mr. Hughes that trip.

Q. You were directed by Mr. Hughes' agent in Grainfield to go to the Haiglers? A. Yes, sir.

Q. And he told you they were more reliable people than C. C. Kerr & Company? A. I thought that was his business—his view of it.

Q. I say, you were told that at the time? A. Yes, sir."

Two instructions only will be considered. The court instructed the jury that the fact that defendants had traded the land obtained from McClure for other land, which latter tract they afterwards sold, as testified to by defendant Kerr, would not justify the defendants in refusing to pay plaintiff "his share of profits on account of the McClure trade, unless the plaintiff was a party to the last two transactions, *provided, always, profits were made.*" Objection was made to the instruction, because of the addition of the words italicised.

We think the instruction as given was ambiguous, in that the question of whether profits were in fact made was not clearly limited to the first transaction between defendants and McClure. However, the objection is highly technical, and the error not alone sufficient to justify a reversal.

The following instruction, predicated wholly on the testimony of McClure, quoted, was given over the objection and exception of plaintiff, and is assigned as error:

"You are instructed that if you find from the evidence that Baker, whom the plaintiff testified was his agent in Gove County, Kansas, sent the purchaser, McClure, to Colorado to purchase land, and at the time of so directing him to make the trip for that purpose, the agent told McClure that he had quit the employ of C. C. Kerr and Company, defendants herein, and directed him to go to the Haigler Investment Company, or to 'Bill Haigler's crowd,' to purchase land, for the reason that they were more reliable and better people than the defendants, C. C. Kerr and Company, that by so doing the agent, Baker, was guilty of an act of bad faith, and that, being the agent of the plaintiff, such act was the act of the plaintiff, and he thereby broke the contract upon which this action is based, and forfeited all right to profits in the sale of lands to McClure, if they were made, and your verdict should in that event, therefore, be in favor of the defendants."

We think the instruction was prejudicially erroneous. The evidence shows beyond any question that while Baker was acting at Grainfield, Kansas, as the representative of plaintiff, he was also acting in an independent capacity as agent for others, including McClure. There is nothing in the evidence upon which to base the instruction that if the jury believed that at the time Baker directed McClure to make the trip to purchase land, said Baker, as agent for Hughes, told McClure that he (Baker) *had quit the employ* of C. C. Kerr & Company, nor that he sent McClure to the Haigler Investment Company, or the "Bill Haigler crowd," "to purchase

land, for the reason that they were more reliable and better people" than the defendants. The instruction is manifestly erroneous, in that it misquotes the testimony upon which ostensibly it was predicated. Moreover, the testimony is wholly insufficient to justify the court in instructing the jury, as a matter of law, that if Baker did make to McClure the statements testified to by McClure, in so making the statements Baker was acting as the agent of the plaintiff, and therefore plaintiff himself was guilty of an act of bad faith, and thereby broke the contract upon which the action is based; or that if such act should by the jury be believed to have been done as the agent of plaintiff, but without his consent, knowledge or ratification, that the plaintiff thereby, as a matter of law, forfeited all rights to profits in the sale of lands to McClure, if profits were made. Such conclusion seems to us inconsistent with good reason and common justice. The question of whether the statements made by Baker were made as the agent of plaintiff, or of McClure, or, as the language testified to indicates, his own individual act, and whether in so making them, the agent, Baker, was guilty of an act of bad faith which should be regarded as the act of the plaintiff, is a matter which should have been submitted to the jury upon appropriate instructions, and not assumed by the court as a matter of law. Nothing herein is to be taken as holding that, even had the plaintiff himself made to McClure the statements attributed to Baker, that fact alone would operate as a forfeiture of his right to recover for profits, in the absence of any showing of prejudice to defendants. It is obvious that if consideration was given by the jury to this instruction, as we must assume it was, the verdict might have been rendered in favor of the defendants, although the jury fully believed from the evidence that large profits were made in the trade between defendants and McClure, and that, as alleged by plaintiff, and apparently admitted by defendants, the sale was the direct result of the services of plaintiff in procuring the purchaser. *Prima facie,* the trade admitted resulted in gross

profits of $3,200, accepting defendants' version of the net list price of the land.

As the judgment must be reversed and the cause remanded for new trial, it will not be necessary to give particular attention to other errors assigned. While the defendants at the opening of the trial, withdrew their offer of judgment in favor of plaintiff for $441.66, they did not withdraw the admissions upon which the offer was made, and it would seem, from such admissions and the proof, that plaintiff was entitled to an instructed verdict for at least that amount, if within the allegations of the complaint or in issue by the pleadings. However, no instruction of that kind was requested by plaintiff, nor was motion made to amend the pleadings to conform to the proof in that respect, for which reason the errors assigned upon failure of the court to give such instruction cannot be sustained.

The judgment is reversed and the cause remanded for a new trial, with directions to permit the parties to amend their pleadings as they may be advised.

Reversed and Remanded.

[No. 3935.]

RUTH ET AL. v. FLYNN, ADMINISTRATOR.

1. EVIDENCE—*Presumptions.* Each of the members of a partnership took out a policy of insurance upon his life, in favor of the firm. It was presumed that the two were in similar terms. (172)

2. LIFE INSURANCE—*Insurable Interest.* The partnership has an insurable interest in the life of each partner; but upon the dissolution of the firm such interest terminates. (181)

3. —— *Construction of Policy.* A policy of insurance upon the life of one of the members of a partnership named the firm as the beneficiary, with the addition "or if the insured survives the aforesaid beneficiary, to the administrators of the insured." *Held,* that upon the dissolution of the partnership the personal representative of the insured partner was, *ipso facto,* substituted as the beneficiary in the policy. (178)

4. PARTNERSHIP—*Dissolution—Partnership at Will.* A partnership at will may be dissolved by either partner, at his pleasure, at any moment. The mere withdrawal is, in law and in fact, a dissolution. (178)

Two partners entered into an agreement of dissolution. One was made the trustee, for "winding up the affairs of the dissolved partnership;" the authority of the other to check against the bank account was revoked; an arbitrator was appointed to adjust their differences; and each partner engaged in business on his own account, taking on no new business on account of the firm. The agreement provided that certain contracts previously taken by the firm should be "completed by both parties * * * exactly as if the partnership was still existing." *Held,* that the firm was dissolved at the date of this agreement. *Held further,* that, no creditor of the firm having, so far as appeared, any notice of the execution of the policy of insurance on the life of one of the partners, subsequently deceased, nor having extended any credit on the face of such policy, the surviving partner should not be heard to assert, as the representative of creditors, a claim for the insurance money; but that, in the adjustment of the partnership affairs he would be entitled to credit for premiums which he had paid upon the policy. (178, 180, 181)

5. CONTRACTS—*Construction.* An ambiguous agreement is to be construed in the light of the subsequent conduct of the parties. (179)

Error to Denver District Court. HON. CARLTON M. BLISS, Judge.

MESSRS. CRUMP & ALLEN for plaintiffs in error.

MR. JOHN H. REDDIN for defendant in error.

CUNNINGHAM, P. J.

The facts involved in this case, and which are necessary to its proper determination, present some interesting questions. We have been able to find but one or two cases that seem to be parallel in all respects. To these we will refer later. A rather full statement of the facts will materially shorten the opinion. Joseph P. Ruth and John T. Flynn, some time prior to February 24, 1909, formed a partnership under the firm name and style of The Ruth-Flynn Construction Company. On September 30, 1908, each member of this firm took out an insurance policy on his life in the sum of $5,000. These policies (at least Flynn's policy, and we presume they were alike) contained the following provision:

"The Capitol Life Insurance Company of Colorado, by this policy of insurance, agrees to pay the sum of $5,000 at its home office in the city of Denver, immediately after the acceptance of satisfactory proof of the fact and cause of the

death of ———————— (the assured) * * * to The Ruth-Flynn Construction Company, with the right of revocation, *or if the insured survive the aforesaid beneficiary*, to the administrators, executors or assigns of the insured."

The policy was made on the application of Flynn himself, and recites that the premium was paid in advance, but the evidence shows that it was paid by a promissory note due six months after date, said note being signed by The Ruth-Flynn Construction Company, and Joseph P. Ruth, and included the amount due as premium on both policies, that is, the policy of Ruth, as well as the policy of Flynn. This note was paid by Ruth immediately after Flynn's death, but some seven months after its maturity. At the time Ruth paid the note, he knew that Flynn was dead, or at least he had been so informed. Flynn died on August 27, 1909. On February 24, 1909, about five months after the policy had been taken out, and about six months before Flynn's death, Flynn and Ruth entered into a written agreement touching the dissolution of the partnership. As we view it, the paramount question involved in this case is, whether the parties to this agreement intended to, and did in fact, terminate and dissolve the partnership at the time of this agreement, so as to substitute for The Ruth-Flynn Construction Company as the beneficiary named in his insurance policy, Flynn's administrator. We shall, therefore, set forth at some length the salient features of the aforesaid dissolution agreement. The introductory portion of the agreement is as follows:

"This agreement, entered into this 24th day of February, A. D. 1909, * * * between John T. Flynn and Joseph P. Ruth, witnesseth as follows:

That whereas John T. Flynn and Joseph P. Ruth have heretofore conducted and are now conducting a partnership under the name of The Ruth-Flynn Construction Company, and,

Whereas, they are desirous of dissolving said partnership;

Now therefore, it is hereby agreed by and between the partners mentioned: that in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, and in consideration of the covenants and agreements hereinafter to be mentioned, and for other good and valuable consideration;

That the said partnership is hereby dissolved by mutual consent.

That the terms of dissolution of the partnership are as follows, and the winding up of the affairs of the partnership shall be conducted as follows:"

Then follows twelve paragraphs or provisions, the first providing that four incompleted pieces of work or contracts which the company held,

"Shall be completed by both parties in a similar manner and on a similar footing and exactly as if the partnership were still existing."

These jobs or contracts are then described. The second paragraph provides that the existing debts and debts to be incurred in the finishing of the four jobs mentioned in the preceding paragraph,

"Shall be paid by the firm as heretofore; that each partner shall contribute thereto exactly as done heretofore."

The third paragraph provides for the collection of amounts due the firm. The fourth paragraph reads:

"That money so collected shall be deposited in the bank account of the partnership as heretofore."

The fifth paragraph reads:

"That all the debts shall be paid from the bank account as heretofore in the regular order of business."

The sixth paragraph provides for equalizing accounts between the partners, and provides further:

"That from this day on none of the partners shall be permitted to draw out any money."

The seventh paragraph provides for the division of the partnership assets. The eighth paragraph, which we quote in full, reads as follows:

"That Joseph P. Ruth shall be entitled to the entire business and everything connected therewith, the name of the firm, and the good-will, and all the property, either personal or not personal, tangible or intangible, present or prospective, and that such property so enumerated shall become the sole property of Joseph P. Ruth."

The next paragraph provides that Ruth shall pay to Flynn $1,800, upon the completion of all the transactions mentioned in the contract, and the complete settlement of the business affairs, that is, as we understand it, after the accounts between the partners had been fully settled, Ruth was to pay Flynn $1,800 for his interest in the business, including the good-will. Paragraph ten reads:

"That both parties hereby agree to and appoint and constitute John B. Giejsbeek as arbitrator of any difference which may arise."

The eleventh paragraph provides for the payment by Ruth to Flynn of $50 on the $1,800 item, the said $50, however, being paid to the arbitrator, Geijsbeek, as trustee, to be held until the other provisions of the contract had been performed, and paid to Flynn in the event they were performed, but returned to Ruth if Flynn should fail to peform his part of the agreement, and Geijsbeek was made the sole judge as to whether the terms of the agreement were or were not properly carried out. The twelfth paragraph reads as follows:

"That the said Joseph P. Ruth, by virtue of his being the continuing partner, and in accordance with the law, is hereby appointed by Flynn as the sole partner and trustee for the winding up of the affairs of the dissolved partnership."

This agreement was duly signed by Flynn and Ruth, and witnessed by Geijsbeek. On the same day that this agreement was signed, Flynn and Ruth addressed a letter to the Central National Bank of Denver, where, presumably the funds of the partnership were on deposit, reading as follows:

"Gentlemen:

We hereby inform you that we have this day dissolved the partnership heretofore conducted under the name of The Ruth-Flynn Construction Company. That Mr. John T. Flynn is to retire from the business, and that the business is to be conducted by Mr. Joseph P. Ruth alone. Mr. John T. Flynn's signature is therefore revoked from this day at the beginning of business."

And at the same time Ruth and Flynn caused the following notice to be inserted and published for thirty days in a Denver paper:

"Notice is hereby given that the partnership heretofore conducted under the name of The Ruth-Flynn Construction Company has been dissolved, commencing February 24, A. D. 1909, and Joseph P. Ruth is hereby constituted trustee for the winding up of the business."

The evidence introduced on the trial does not show that there was any partnership business transacted after February 24th, except in connection with the completion of the four jobs mentioned in the agreement, and several months before Flynn's death Ruth was working in Arizona and Old Mexico, on contracts taken in his own name, or at least, contracts taken after the dissolution of the partnership, in which Flynn had no interest, and apparently Flynn was conducting business prior to his death in which Ruth had no interest. On the death of Flynn the Insurance Company filed a petition in the District Court in which it set up the issuance of the policy, the death of Flynn, and the contention that had arisen between Bart Flynn, the administrator of John T. Flynn's estate, and Joseph P. Ruth, touching the distribution of the proceeds of the policy, admitting its liability for the payment of $5,000, and praying an order of the court requiring the said Flynn and the said Ruth to come into court and interplead, and further asking authority to pay the $5,000 into the registry of the court funds. This petition was granted by the court, and Bart Flynn, the administrator, and Joseph P.

Ruth filed petitions in the case, each claiming the proceeds of the policy. Judgment finally went in favor of the administrator, from which judgment the case is here for review by writ of error.

Apparently the policy, at the time of Flynn's death, was in his possession. Geijsbeek, the arbitrator, was a certified accountant, and had had charge of the books of the company prior to and after the dissolution agreement to which we have referred; he officiated in the capacity of bookkeeper and arbitrator until June 21, 1909—four months after the date of the dissolution agreement and two months before Flynn's death—when he turned the books over to Mrs. Ruth, Ruth, apparently, at the time, being in Arizona or Old Mexico. Nothing was ever said to Geijsbeek by either of the partners concerning the life insurance policy that each of them had taken out in favor of the partnership, nor was the note given for the payment of the premium on these policies ever mentioned to him, and he had no knowledge that there was any such insurance until after the death of Flynn, when he was advised concerning the same by the agent of the insurance company. According to the testimony of Geijsbeek, which was not contradicted, he found the gross indebtedness of the firm to be $1,249.98. The uncollected sums due the partnership would reduce this amount to $684.50. If all the outstanding bills due the firm were uncollectible, still Flynn would owe the firm but a little over $600; that is, he would be required to contribute a little over that sum to meet his half of the gross indebtedness, besides which he was indebted on an overdraft to the firm in the sum of $103.74, so that his total liabilities, if Ruth had performed his part, would have been but little over $700, if no part of the amount due the firm had been collected; if all the outstanding bills were collectible, then Flynn's actual liabilities to the firm would have been reduced almost $300, leaving something over $400 justly due from him to the firm. In this connection it must be remembered that Ruth, by the agreement, owed Flynn

$1,800 as the purchase price of his, Flynn's, interest in the business. Taking all these figures together, Geijsbeek, who, as we have seen, was made the sole arbitrator, and who was an expert accountant, found, and so testified, that Ruth justly owed to Flynn $1,405.88. Flynn attempted to collect this amount from Ruth, and Geijsbeek proposed different methods in order to bring about an amicable settlement between the partners. Finally, Ruth wrote from Old Mexico, authorizing Flynn to make settlement with his wife, Mrs. Ruth, and she offered Flynn $750 in settlement, but this he declined to accept. We think these figures are not particularly important, in the view we take of this case, but we shall allude to them later, in connection with certain contentions with reference to the rights of creditors.

1. If the partnership was in fact dissolved on February 24, or at any time prior to Flynn's death, for that matter, then the representative of his estate was, by the terms of his policy, *ipso facto,* substituted as beneficiary for The Ruth-Flynn Construction Company. Counsel for Ruth contends the partnership was not dissolved, and bases his contention upon the fact that there had not been a complete settling or winding up of the affairs of the partnership. The authorities do not support this contention. So far as disclosed by the record this was a partnership at will, and therefore, might be terminated at any moment, at the pleasure of either of the partners.—Burdick on Partnership, (2nd ed.), p. 346.

That it was the intention of the partners to dissolve the partnership on the 24th day of February, 1909, is clear, (their subsequent conduct was sufficient to have worked a dissolution had no such agreement been entered into) for, as we have pointed out (a) Flynn's authority to draw checks on the bank was revoked; (b) Ruth, by the agreement, was made the sole partner and trustee "for the winding up of the affairs of the dissolved partnership;" (c) they appointed an arbitrator and attempted to confer upon him sole power to adjust their dif-

ferences, and finally (d) each party engaged in business on his own account, taking no new firm business whatever after the time of the dissolution agreement.

"In reality, according to the evidence as it now stands, both the parties abandoned the co-partnership and quit it, and ceased to do business together as a firm."—*Lendholm v. Bailey,* 16 Colo. App. 193, 64 Pac. 586.

As was said in that case, under similar circumstances, the letters from Ruth to Flynn clearly indicated that, so far as Ruth was concerned, the firm was dissolved and at an end, and it was his purpose or his understanding that the partnership should no longer carry on its affairs or do business as a concern.

"In the language of the books the partnership was dissolved because it had ceased to do the business for which it was organized, and they all agree that where two partners abandon business, and treat it as ended, it will work an absolute dissolution of the concern." Citing cases. "Under these authorities it is very clear that there was an end put to the business and that the partnership was dissolved. It is not true that the holding of the fifty-five head of cattle operated to continue the concern and prevent the dissolution. It has been well adjudged that the holding and sale of specific articles in no manner tends to revive a cause of action which has been barred because of dissolution, neither does it tend to continue the concern."—*Lindholm v. Bailey, supra.*

In *Blake v. Sweeting,* 121 Ill. 67, 12 N. E. 67, it is ruled that a partnership, when not formed for any definite time, may be terminated by any member of the firm at his pleasure. The withdrawal of one of the members of the firm, in fact and in law, is a dissolution of the firm. In the *Blake* case there was no written notice of dissolution published or given, but simply an abandonment by one of the members of the firm, who advised his associates by letter that he had no money, and they might settle the firm business as they pleased. More than six years after this abandonment one of the mem-

bers of the firm filed a bill to effect a settlement of the co-partnership, and the court held the plea of the statute of limitations to this bill good. In *Bank of Montreal v. Page,* 98 Ill. 109, it is said:

"It is true, after dissolution, a 'kind of community of interest, of power and liability,' as between the original partners, continues—but this is only for the purpose of closing up or 'winding up' the affairs of the partnership."

From *Hamilton v. Smith,* 120 Ia. 93, 94 N. W. 268, we quote the following:

"A dissolution of a partnership does not necessarily involve the disposition of its property, nor a settlement between partners. The power to wind up its business, settle its accounts, and distribute the assets continues after dissolution."

To the same effect is *Gilmore v. Ham,* 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 544. See, also, *Quale v. Guild,* 91 Ill. 378; *Ligare v. Peacock,* 109 Ill. 99; *Potter v. Tolbert,* 113 Mich. 486, 71 N. W. 849; *Brewer v. Browne,* 68 Ala. 210; *Gray v. Kerr,* 46 Ohio St. 652, 23 N. E. 136; *Montgomery v. Montgomery,* Rich. Eq. Cas. (S. C.) 64; *Bonney v. Stoughton,* 122 Ill. 536, 13 N. E. 833; *Richardson v. Gregory,* 126 Ill. 166, 18 N. E. 777; *Arnett v. Finney,* 41 N. J. Eq. 147, 3 Atl. 696; *Wells v. Brown,* 83 Ala. 161, 3 South. 439.

Under the facts as proven, and the authorities here cited, we entertain no doubt that the partnership between Ruth and Flynn was dissolved and terminated on February 24, 1909.

2. Some contention is made that the policy of insurance was taken out for the benefit of creditors, and that the rights of these creditors required that the policy should be paid to the surviving partner, rather than to the administrator. There are several answers that appear to us sufficient to dispose of this contention:

First, the creditors of the co-partnership are not here complaining; second, there is no evidence that the creditors of the co-partnership extended credit upon the faith of this

policy, or, indeed, that they ever had knowledge of its existence. (A most interesting and thoroughly briefed case involving the right of creditors in a life insurance policy is that of *Keckley v. Glass Co.*, 86 Ohio St. 213, 99 N. E. 299); third, if the creditors had notice of the existence of the policy, it must be assumed they knew there was no obligation resting on Flynn, or upon the partnership, to continue it in force, and that Flynn might at any time lawfully change the beneficiary by substitution, while either partner might, at will, work a change by electing to terminate the partnership; fourth, there is no evidence in the record that the estate of John T. Flynn is insolvent, and if it is not, creditors, of course, may look to the proceeds of this policy, as well as to any other assets of said estate, if it becomes necessary for them to do so in order to collect what is due them from the partnership. The attempt of Ruth to invoke in this case the rights of creditors of the partnership would come with more force if he were not indebted to Flynn in a sum exceeding the gross liability of the partnership.

3. We have assumed, for the purposes of this case, that the partnership had an insurable interest in Flynn's life, and that the policy, when taken out, was valid. We agree with counsel for plaintiff in error that the weight of authority supports this view. This doctrine, however, as appears from most of the cases relied upon by plaintiff in error and cited and quoted from in his brief, is predicated upon the theory that when one member of a partnership dies, the concern loses his skill, his knowledge and experience in the business, as well as his constant efforts in its upbuilding, and therefore, his life is a source of much benefit to the co-partnership. See:

Con. Mutual Life Ins. Co. v. Luchs, 108 U. S. 505, 2 Sup. Ct. 949, 27 L. Ed. 800; *Warnock v. Davis*, 104 U. S. 775, 779, 26 L. Ed. 924; *Morrell v. Trenton Mut. L. & F. Ins. Co.*, 10 Cush. (Mass.) 287, 57 Am. Dec. 92; *Bevin v. Ins. Co.*, 23 Conn. 251; *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38; *Trenton Ins. Co. v. Johnson*, 24 N. J. Law 576.

But these cases are not in point here, because, at the time of Flynn's death, the partnership theretofore existing between him and Ruth was not interested in his life. He had long before that event ceased to work for the partnership. His former partner was, indeed, indebted to him, and he had been unable to collect what was justly due him from Ruth It was not understood by anyone that Flynn would continue to work in the interest of the partnership, or that it was his duty to do so. In *Cheeves v. Anders, Administrator,* 87 Tex. 287, 28 S. W. 274, it is ruled that the interest in a policy upon one member of a partnership, held by the firm, ceased upon the dissolution of such firm, and the survivor has no interest in the recovery. See *Bank of Macon v. Loh,* 104 Ga. 446, 44 L. R. A. 372. Of course in the settlement of the affairs of the partnership Ruth will be entitled to credit for the sum which he paid as premium on the Flynn policy.

There are other matters considered in the brief which we think it is not necessary that we should discuss, though the same have received our careful attention.

The judgment of the trial court is affirmed.

HURLBUT, J., dissenting.

KING, J., specially concurring:

While agreeing with the conclusion reached by the majority of the court, and in no way dissenting from the reasons given by the Presiding Judge for such conclusion, I wish to state the reason which most strongly appeals to me. The agreement for dissolution of partnership may be regarded as, and conceded to be, ambiguous. In some of its provisions it is an unequivocal dissolution as of its date; in others it appears to be a present agreement for a dissolution in the future. As a whole, I regard it as more strongly indicating an intention to effect an immediate dissolution, than a dissolution to take place in the future; but because of such ambiguity, the agreement may, and, in my opinion, should, be construed in accordance with the well recognized canon of construction frequently applied to such contracts, that the parties to an

ambiguous contract are bound by the practical interpretation which they themselves give it.

"A construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract," adapted from Wharton on Contracts, vol. 1, section 206, and is followed in *Union Pac. R. Co. v. Anderson,* 11 Colo. 293, 18 Pac. 24; *McPhee v. Young,* 13 Colo. 80, 87, 21 Pac. 1014, 1016; *Farrell v. Garfield M. M. & S. Co.,* 49 Colo. 159, 111 Pac. 839; *Fearnley v. Fearnley,* 44 Colo. 417, 98 Pac. 819; *Bullock v. Lewis,* 22 Colo. App. 449, 125 Pac. 849; *Animas Consol D. Co. v. Smallwood,* 22 Colo. App. 476, 485, 125 Pac. 594, 596. I quote from some of said decisions, as follows:

"Thus far only the instrument itself has been considered. If, however, the intent and meaning of the parties is not clearly disclosed by the language of the contract, then competent evidence bearing upon the construction given to the instrument by the parties themselves, by their acts and conduct in its performance, may be considered."—*McPhee v. Young, supra.*

"Where the language is vague or ambiguous, the conduct of the parties, and the construction which they have put upon it while engaged in its performance, and before controversy has arisen, is one of the most reliable tests of their intention."—*Farrell v. Garfield M. M. & S. Co., supra.*

"The best indication of the true intent of the parties to a contract is the practical interpretation given by the parties while engaged in the performance of it and before any controversy has arisen."—Scott, P. J., in *Animas Consol. D. Co. v. Smallwood, supra.*

The extent to which this rule is enforced is evidenced by the following excerpt from *Reissner v. Oxley,* 80 Ind. 580, 584:

"The right of the parties to put an interpretation upon their own contracts, even to the extent of doing away, practically, with the ordinary and plain meaning of terms, can

not well be denied, so long as their interpretation does not result in a contract which for some reason is in itself unlawful. And the cases are numerous and consistent, which permit a resort to proof of the circumstances or situation of the parties, when their contract was made, and of their transactions under it, when its terms are of doubtful or ambiguous meaning, for the purpose of arriving at the true intention."

The interpretation which the partners placed upon this contract is clearly disclosed in their published notice of dissolution, and their letter to the bank (both of which are quoted in the main opinion), in one of which it was stated, "We have this day dissolved the partnership heretofore conducted," etc., and in the other, that "the partnership heretofore conducted under the name of The Ruth-Flynn Construction Company has been dissolved," and that the authority of the retiring partner was revoked. It is true that by the agreement, certain uncompleted contracts were to be finished by the persons who had theretofore been partners, but this obligation would have rested on each of them as to third parties, without regard to the dissolution of the partnership; and this agreement to perform certain specific obligations did not tend to continue the partnership.—*Lendholm v. Bailey,* 16 Colo. App. 190, 195, 64 Pac. 586; and, as well stated by the Presiding Judge in the majority opinion in the case at bar, in other respects the former co-partners, after the agreement, acted as they would have acted if they had regarded the partnership as ended, until, subsequent to the death of Flynn, the controversy arose as to the insurance policy.

Because of the practical construction which the parties placed upon their agreement, I regard their intention as conclusively settled in favor of the theory insisted upon by the administrator, and the continuing partner should be now estopped from asserting any other construction.

[No. 3960.]

TAYLOR v. BASTIAN.

1. DECEIT—*False Representations,* that the stock of a corporation has been practically subscribed and paid for, and that the corporation is possessed of valuable assets, known to be false by the party making them, entitles one who has been thereby deceived, and induced to purchase shares, to recover the money with which he has parted.

2. APPEALS—*Substantial Justice Accomplished.* It appearing from the testimony given by the appellant himself that the judgment given below was in every respect a just one, the court declined to consider assignments of error based upon the receipt and rejection of testimony or the giving and refusing of instructions.

Error to Denver District Court. HON. GREELEY W. WHITFORD, Judge.

MR. WAYNE C. WILLIAMS for plaintiff in error.

MR. HARRY S. SILVERSTEIN for defendant in error.

Per Curiam.

Plaintiff in error, Taylor, as defendant below, together with one J. H. Kelley, by false and fraudulent representations induced the defendant in error, Bastian, to purchase from Kelly certain shares of stock in a corporation which Taylor was promoting. These fraudulent representations consisted in statements made by Kelley and Taylor calculated to induce in the mind of Bastian a belief that the corporation, which was organized, among other things, for the purpose of constructing a railroad and promoting town sites, possessed valuable assets, which in truth and in fact it did not own, and that practically all the stock of said corporation had been subscribed and paid for, while but very little of said stock had been paid for or unqualifiedly subscribed. Upon discovering these facts, Bastian brought suit to recover the money which he had paid for said stock, and had judgment.

The evidence shows with reasonable clearness that the stock had no value whatever; and it also showed conclusively that both Taylor and Kelley, and especially Taylor, must have known of the falsity of the statements which they made to

Bastian. Indeed, the proof was so clear that it is probable the trial court would have been warranted in instructing a verdict for Bastian. Under these circumstances, we are not disposed to consider the various assignments of error based upon the giving and refusing of instructions or the receiving and rejecting of evidence. We are satisfied, from the evidence of Taylor himself, that the judgment (from which Kelley sought no appeal) is a just one, and ought not to be disturbed. The propositions of law, ably discussed in his brief by counsel for plaintiff in error, present no novel questions which justify their consideration in this opinion.

The judgment of the trial court is affirmed.

[No. 4036.]

CONTINENTAL TRUST COMPANY ET AL. V. PATTERSON ET AL.

1. JURISDICTION—*Of the Subject Matter.* Mortgage creditor filed in Weld District Court a bill to foreclose the mortgage. A month later, in the Denver District Court, receivers were appointed for a railway company which was equitably entitled to the mortgaged premises. *Held,* by the filing of the foreclosure bill the Weld District Court acquired jurisdiction of the subject matter of the litigation, and might lawfully proceed to decree foreclosure. (188)

2. APPEARANCE—*Effect.* It seems that where a receiver answers a complaint, filed in a court other than that in which he was appointed, making no objection to the jurisdiction, he will not be heard to afterwards question the jurisdiction upon the ground that the consent of the court of appointment has not been obtained. (188)

3. PLEADING—*Prayer,* in a bill of foreclosure, for "such further relief as may be meet and agreeable to equity," warrants a personal judgment against the mortgagee for any deficiency in the proceeds of the sale of the mortgaged lands. (189)

4. —— *Other Action Pending.* Mortgage creditor having instituted in Weld District Court a bill of foreclosure, afterwards filed in Denver District Court a claim against the receivers of a railway company, for the mortgage moneys. The receivers were defendants in the foreclosure bill. Not having filed in that suit any plea of another action pending, or otherwise called attention to the mortgagee's claim in the Denver court, the receivers were held to have waived the irregularity. (189)

The court observed that the receivers, by motion in the Denver court might obtain adequate relief. (190)

Error to Weld District Court. HON. NEIL F. GRAHAM, Judge.

Mr. George L. Nye, Mr. W. W. Garwood for plaintiffs in error.

Mr. R. E. Winbourn for defendants in error.

Cunningham, P. J.

This was an action brought by W. R. Patterson and others, who were trustees of the Elks Lodge at Greeley, to foreclose a trust deed which had been given them in their representative capacity, as security for a balance due on the purchase price of certain lots, the action being brought against W. L. Clayton, as trustee, who, as trustee, had given the trust deed in question. It developed on the trial that Clayton was trustee for the Denver, Laramie and Northwestern Railroad Company, and at the time the Elks Lodge sold the lots to Clayton, as trustee, he, Clayton, was really taking the title for said railroad company. Afterwards Patterson, and the other trustees of the Elks Lodge, who were the plaintiffs, by petition, brought in the railroad company and the Continental Trust Company and Marshall B. Smith, who, after the filing of the original complaint, had been appointed by the Denver District Court as receivers for the railroad company. Upon the petition filed by Patterson and the other trustees of the Elks Lodge, the court made an order permitting the railroad company and its receivers to "appear and defend in the suit, if they so desire, to set forth their respective claims." The railroad company and its receivers were served with summons, filed verified answers, and made a general appearance, without in any manner objecting to the jurisdiction of the Weld County District Court. The case was tried on its merits, the receivers being represented on the trial by an attorney, as was the railroad company. Judgment was rendered in favor of the plaintiffs, trustees of the Elks Lodge, in the ordinary form, and in favor of L. E. Armstrong, who in the meantime had intervened, for the reason that he had what was in effect a second mortgage on the real estate. But the judg-

ment in favor of Armstrong was made subordinate or junior to the plaintiffs' judgment. The Continental Trust Company and Marshall B. Smith, receivers of the railroad company, sued out a writ of error to the judgment, and brought the case here for review. Later Hugh U. Wallace was substituted for Smith as receiver. This is not a complete, but a sufficient statement for the purpose of considering such assignments of error as we think require notice.

Plaintiffs in error challenge the jurisdiction of the District Court of Greeley, "upon the ground that all of the assets of the Denver, Laramie and Northwestern Railroad Company were under the control of the District Court of Denver, through receivers." They also deny the authority of the Weld County District Court to interfere with the receivers' property held in the custody of said court. In other words, by their assignments of error, plaintiffs in error contend that the property which the defendants in error are seeking to reach by this foreclosure proceeding was *in custodia legis*. In this connection, it will be remembered that, as to plaintiffs, their rights were initiated by filing their bill more than a month before the receivers were appointed. Therefore, so far as plaintiffs were concerned, proper jurisdiction of the subject matter was obtained long before the District Court of the City and County of Denver took control of the affairs of the railroad company, through its receivers. The receivers, as we have seen, voluntarily entered their appearance in this cause in the Weld County District Court, without any attempt to challenge the jurisdiction of that court. It would seem that where a receiver answers a complaint filed in another court, submits to the jurisdiction of the trial court, and makes no objection thereto, he thereby waives the right thereafter to object to the jurisdiction on the ground that the consent of the court appointing him had not first been had and obtained.—*St. Joseph & Denver R. R. Co. v. Smith*, 19 Kans. 225. There is no contention whatever as to the justness of

the judgment in favor of the plaintiffs, and no reason can be perceived for disturbing the same as to them.

What we have said with reference to the status of the defendants in error, the lodge trustees, applies with equal force to Armstrong, the intervenor, with this exception: It appears that the intervenor did not specifically pray for relief against the railroad company, and did not ask for money judgment against the receivers, that is to say, the prayer of the intervenor's petition did not specifically ask for a deficiency judgment, whereas the decree provided, among other things, that the said intervenor should have and recover of and from the said defendant, the Denver, Laramie Realty Company, the sum of $1,068.79, and costs, and a like decree was given against other original makers or assignors of the particular notes which Armstrong held. Personal judgment in like form was given against the receivers of the railroad company, as receivers, in favor of the intervenor. But by his prayer the intervenor asked for "further relief as may be meet and agreeable to equity," etc. Under such prayer, we think a personal or deficiency judgment may be sustained, where the allegations of the complaint and the proof warrant.

It also appears that Armstrong, the intervenor, after having filed a petition of intervention in this cause, also filed his sworn claim before the receivers of the railroad company, and it is contended on behalf of the receivers that said claim, being the same as the one Armstrong sues on in this action, was in process of adjudication in the District Court of Denver, when the decree in this case was entered. Upon these allegations, which were established, it is contended that the intervenor, having submitted his claim to the jurisdiction of the Denver District Court, could not have it adjudicated in the Weld District Court. Perhaps it was irregular for the intervenor to file his claim in the receivers' proceeding, after he had intervened in this suit, but since the receivers appear to have interposed no plea of another suit pending, or otherwise called the court's attention to the matter, we think this

irregularity was waived. Moreover, if the receivers feel aggrieved by the action of the intervenor in filing his sworn claim in the receivers' proceeding, we apprehend they can, now that the said claim has gone to judgment in this proceeding, secure speedy and adequate relief by a motion filed in the receivership proceeding to strike the intervenor's claim from the files, for the reason that it has been adjudicated in this proceeding.

Other contentions were made on the trial, which we do not regard as vital, and still others covered by assignments of error were abandoned by plaintiffs in error in their brief.

Perceiving no error prejudicial to the substantial rights of the plaintiffs in error, the judgment of the trial court is affirmed.

Judgment Affirmed.

[No. 3813.]

MATHIESEN ET AL. V. NORTH POUDRE IRRIGATION COMPANY.

APPEAL AND ERROR—*Findings Upon Conflicting Evidence,* conclude the court of review. (191)

Appeal from Larimer District Court. HON. NEIL F. GRAHAM, Judge.

MR. FRANK J. ANNIS for appellants.

MR. R. W. FLEMMING and MR. J. F. FARRAR for appellee.

BELL, J.

The District Court of Larimer County, in the trial of this case, found that appellee is the owner of reservoir No. 14, known as Fossil Creek reservoir, and a certain large inlet ditch leading thereto from the Cache la Poudre river, and all appurtenances of said Fossil Creek reservoir; that appellee is the owner of the waters annually stored in said Fossil Creek

reservoir, and the water in said inlet ditch to said reservoir; that appellants are the owners of the south half of the southeast quarter of section ten and the northeast quarter of section fifteen, all in township six north, range sixty-eight west, sixth principal meridian, in said county; that there is a certain tile headgate located in said inlet ditch to Fossil Creek reservoir, near the premises hereinabove described, and a ditch leading therefrom to the premises above named, and that, during the years 1906 to 1910, both inclusive, appellants raised said headgate, and diverted from said Fossil Creek inlet ditch the waters of appellee flowing therein, and used the same for the irrigation of 30 acres of said lands; that appellants claimed the right to open said headgate and use appellee's water there through for said purposes, and that the value of the water diverted and used as aforesaid is $600.00; that appellants had no right or title to the water so diverted and used; and that all of their acts in the premises were wrongful and unlawful. Upon these findings, the court gave judgment in the sum of $600.00 and costs against appellants, and permanently enjoined them and their privies in estate and title from diverting the waters from said Fossil Creek inlet ditch and from said Fossil Creek reservoir.

Appellee formerly owned the lands described and conveyed the same by two separate deeds, under two separate contracts, the first of which specifically provided that no water should go with the land therein contracted to be conveyed, and the second provided for the conveyance of certain water rights, but the deed given thereunder made no mention of or reference to said rights. Both contracts and deed, among other exhibits, were received in evidence, and much conflicting testimony was given as to the intention of the parties concerning the water rights mentioned in the second contract. The findings of the trial court as hereinbefore set forth are based upon such conflicting evidence, and, under a well established rule of law, we are bound by its conclusions thus reached: *Farmers' Co. v. Brown*, 23 Colo. App. 570,

577, 131 Pac. 291; *Pagosa Springs v. People*, 23 Colo. App. 479, 510, 130 Pac. 618; *Wells v. Crawford*, 23 Colo. App. 103, 106, 127 Pac. 914; *Manzanarez v. Rominger*, 23 Colo. App. 76, 77, 127 Pac. 241; *Stevens et al. v. Adams*, 53 Colo. 511, 512, 127 Pac. 957.

Finding no reversible error in the record, the judgment is hereby affirmed.

Affirmed.

Decided March 9, A. D. 1914. Rehearing denied July 13, A. D. 1914.

[No. 3919.]

BELL V. BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY ET AL.

1. PLEDGEE—*Authority.* One holding negotiable paper pledged to her as collateral security recovered judgment thereon and afterwards agreed with an attorney that, for his services in enforcing the judgment, and compelling payment thereof, he should receive twenty per cent of the amount collected. The agreement was within her authority. (197)

2. TRUST FUNDS—*Equitable Assignment.* Such agreement of the pledgee operated as an equitable assignment, *pro tanto*, and gave the attorney a lien upon the judgment, for the stipulated fee. (197)

3. ——*Authority of Beneficiary in a Trust.* Schradsky recovered judgment against Lake County upon certain coupons assigned to her by one Johnson, as collateral to a loan. As against Johnson, Sullivan was entitled to an interest in the proceeds of the judgment. *Held*, that an assignment by Sullivan to the county of his interest in the judgment, was without effect as against the lien of an attorney employed by Schradsky to enforce payment of the judgment. (198)

4. ATTORNEY—*Lien.* One who had recovered a judgment against the county agreed with an attorney that he should receive a certain percentage of the amount of the judgment for services in enforcing payment thereof. The agreement gave the attorney a lien upon the judgment not inferior to that conferred by the statute. (199)

Any adjustment made by the county, in disregard of this lien after notice thereof, was at its peril. (199)

The effect of an adjustment without notice not decided.

5. —— *Contingent Fee. Semble*, an attorney may lawfully contract to conduct a litigation for a share of the recovery. (197)

6. NOTICE—*To Chairman of County Board Affects the County.* The chairman of the board of county commissioners, while attempting to adjust a judgment theretofore recovered against the county, received actual notice of a lien against the judgment asserted by an attorney.

Held, this notice affected the county; that it was not required that such notice should be in writing, or served upon the board while in session. (199, 200)

7. —— *Implied—of What Might Have Been Learned by Inquiry.* S. had recovered a judgment against Lake County. An attorney was entitled to a lien thereon for his fees. *Held*, that the county taking an assignment from any person other than S. was chargeable with notice of whatever it might have learned by inquiry of S. (202)

Error to Denver District Court. HON. H. L. SHATTUCK, Judge.

MR. H. E. LUTHE, MR. L. M. GODDARD for plaintiff in error.

MR. FRANCIS E. BOUCK, MR. JOSEPH W. CLARKE for defendants in error.

KING, J., delivered the opinion of the court.

For brevity, the plaintiff in error will be called plaintiff, as in the trial court. The Board of County Commissioners will be called the board. Schradsky will be so designated.

Prior to the 27th day of November, 1903, a judgment had been rendered in the District Court of Arapahoe County against the defendant the Board of County Commissioners of Lake County, in favor of the defendant Frieda Schradsky, for the sum of $11,496.75, and affirmed by the Supreme Court.—*Lake County v. Schradsky*, 31 Colo. 178, 71 Pac. 1104. The board having refused to pay the judgment, the said Schradsky, on the 27th of November, 1903, began and thereafter prosecuted a mandamus proceeding against the board for the purpose of compelling it to levy a tax for the payment of said judgment. The complaint in the mandamus proceeding was filed by one H. B. Johnson as attorney for Schradsky. During the pendency of the suit, and before trial, Johnson departed this life, and the plaintiff herein was employed by Schradsky, as attorney, to prosecute the suit, and it was agreed that, as compensation for his services, he should receive out of said judgment, when collected, an amount equal to twenty per cent of the judgment. If he

failed to collect, he was to receive no compensation. The judgment against Lake County aforesaid was obtained by Schradsky, in a suit upon interest coupons cut from negotiable bonds issued by the said County of Lake, both interest and principal being payable to bearer. The interest coupons had been delivered to Schradsky by said Johnson, as collateral security for moneys advanced to him by her and one Leo Bach, and the amount of the judgment was in excess of the sum required to satisfy the indebtedness for which the coupons had been pledged. (See *Lake County v. Schradsky, supra.)* After the employment of plaintiff herein by Schradsky to prosecute the mandamus proceeding, upon the agreement hereinbefore mentioned, a contract, dated August 10, 1903, between a man named Sullivan and said Johnson, was discovered among the papers of Johnson's estate, by which it was agreed that the said interest coupons had been by said Sullivan delivered to Johnson for sale or collection, by such means as Johnson might employ, and that Johnson had conveyed the same to Frieda Schradsky and brought suit thereon and obtained judgment, in consideration of which, and other legal services, Sullivan assigned to Johnson one-half of the said judgment—principal and interest—and each recognized the other as the owner of one-half of said judgment. Upon discovery of this contract, on or about May 1, 1904, Bell demanded and obtained an agreement upon the part of said Sullivan and the administratrix of the estate of said Johnson, by which, for prosecuting the said mandamus proceedings to final conclusion, plaintiff should receive, as his compensation, out of said judgment, when collected, an amount equal to twenty per cent thereof, supplementing and ratifying the agreement made by Schradsky. The suit was prosecuted to final judgment in the District Court, rendered in Schradsky's favor November 5, 1904, which was affirmed by the Supreme Court on the 6th day of April, 1908.—*Lake County v. Schradsky,* 43 Colo. 84, 95 Pac. 312. The county having still failed to pay the judgment, or to make levy therefor, the plaintiff caused the board

to be cited into court for contempt, for refusal to comply with the order in the mandamus proceeding; whereupon the board paid into court, in part satisfaction of the judgment, a portion thereof which it admitted to be due to Frieda Schradsky for her interest in said judgment, but failed and refused to pay the equitable or beneficial interest of said Sullivan, or the twenty per cent thereof claimed by plaintiff as his interest in said judgment, under the agreement aforesaid. Such refusal to pay was based upon an alleged assignment to the county by Sullivan of his interest in said judgment, and satisfaction therefor by reason of said assignment. Plaintiff brought this suit against the board and said Schradsky, praying for a judgment against the board for an amount equal to twenty per cent on one-half of said judgment, and that "said sum be decreed to be a lien upon the judgment against the defendant, and in favor of the said Schradsky," and that the county be required to pay into court that amount to satisfy plaintiff's lien on the said judgment, and that Schradsky be required to prosecute and enforce the judgment of mandamus as against the board for the purpose of collecting a sum sufficient to pay plaintiff's demand. Schradsky confessed the bill. The assignment, which the board contends was an assignment of the judgment to it, was attached to the agreement between Sullivan and Johnson, hereinbefore mentioned, was dated April 2, 1906, and was in the following words:

"For value received, I hereby sell, assign, transfer and set over unto Jos. A. Lamping, County Treasurer of Lake County, Colorado, and his successors in office, for the use and benefit of said Lake County, a municipal corporation, all my right, title and interest in and to the foregoing contract, and all my rights thereunder."

On or about the 18th day of November, 1908, plaintiff filed in the District Court of the City and County of Denver, in which court the mandamus suit was pending, a written statement constituting his claim of attorney's lien.

It was shown by the evidence of two witnesses, and not disputed, that in 1905, prior to the aforesaid assignment to Lake County, plaintiff notified the chairman of the board that he had and claimed a lien on the said judgment, and of the amount thereof; and it is also in evidence that the same statements were made to two other members of the board, and that said statements were made at a time when the said chairman and the said members of the board were endeavoring to negotiate a settlement of said judgment. It is also in evidence, and not disputed, that the County Attorney of Lake County, who secured from Sullivan the assignment of the contract, knew that Bell had a claim against said judgment, although perhaps not the amount thereof. It appears from the testimony of the County Attorney that at about the time he took the assignment, but whether before or after is not shown, he had a conversation with plaintiff herein, in which the County Attorney inquired as to whether Sullivan had settled with Bell for his services, and was advised that he had, and that the County Attorney understood that Bell had reference to the Schradsky judgment; but it is also shown that Bell had prosecuted suits for Sullivan against Lake County, in Sullivan's name, and that settlement for those services had been made, and that Bell had reference to those judgments of claims, and not to the judgment which stood in the name of Schradsky; and it is shown that at the time of such conversation, Bell did not know that Sullivan's equitable interest in the Schradsky judgment had been assigned to Lake County, nor does it appear that Bell knew any such assignment or settlement was contemplated.

When plaintiff offered evidence that the board had actual knowledge of his claim, objection was made and sustained, and exceptions duly reserved; the evidence was then admitted subject to being struck out if the court, after consideration of authorities to be produced, retained its opinion that the evidence was not admissible. At the conclusion of the trial, the court sustained the objection that was made to the admissi-

bility of the said testimony, but did not expressly strike it out, although doubtless it was so intended. It was found by the court that the testimony offered by Bell and his witnesses, and the testimony of Judge Cavender (then County Attorney) for defendant, was true, as also all other testimony, except that of Sullivan, to which it did not give credit. Sullivan's testimony was the only testimony offered which in any material matter disputed the evidence offered by the plaintiff and his witnesses. Cavender and the plaintiff differed in some respects, but not substantially upon any matter of importance. Upon such findings of fact, the court took the case under advisement as to the law, and later rendered judgment for the defendant county, without giving its reasons therefor.

We think it unnecessary to determine whether plaintiff secured an attorney's lien as such by virtue of giving notice as provided by statute—Section 293 M. A. S. 1912, 242 R. S. '08—as the decision will turn on another point.

1. Schradsky was the legal owner of the judgment obtained against Lake County upon the interest coupons assigned to and held by her as collateral security. She held the judgment in trust, coupled with an interest in herself, and as such trustee was obligated to enforce payment of and collect the same.—*Lake County v. Schradsky*, 31 Colo. 178, 182. It was also her right and duty to apply the proceeds, first to the payment of the amount due her and Leo Bach, with costs of collection, and thereafter to account to her pledgor Johnson (or Johnson and Sullivan) for any balance of said judgment in excess of her claim, with costs and expenses, including the attorney's fees. Her agreement with plaintiff for a fee of twenty per cent of the judgment when collected, was within her power as such trustee, and operated as an equitable assignment thereof *pro tanto* to plaintiff, and gave him a claim upon the specific fund for the payment of his fee.—*Patten v. Wilson*, 10 Casey (34 Pa. St.) 299; *Terney v. Wilson*, 45 N. J. Law 282, 284; *Ely v. Cook*, 28 N. Y. 365; *Williams v. Inger-*

soll, 23 Hun. 284. If there be any doubt as to the power of the trustee to make the contract binding upon the fund as to Sullivan and Johnson, that question is rendered harmless by the fact, established by the evidence, and so found by the court, that Sullivan and the administratrix of Johnson ratified the agreement made by the trustee, or made the same agreement for themselves as to their interests. Inasmuch as the legal title to the judgment was vested in Schradsky, it was impossible for Sullivan, as beneficiary, to divest her of her power over and control of the fund, until she and plaintiff as her assignee should be paid and satisfied for the legitimate expense of executing the trust.—*Ballinger v. Yates, ante* 116, 140 Pac. 931. And to the extent of plaintiff's fee covered by the equitable assignment of the judgment constituting the trust fund, for the purposes of this suit plaintiff himself may be regarded as subrogated to the rights of Schradsky, which right in plaintiff she has admitted, by confession of the bill, to the same extent and effect as if she had joined with plaintiff in this suit. And it follows as a logical sequence that Sullivan, by an assignment of his equity in the judgment (which, in fact, was an assignment only of a chose in action against Schradsky, represented by the contract with Johnson under which he could require from Schradsky an accounting), could not vest the County of Lake with any other or better interest than he himself had, nor by an assignment to the county or settlement with it of his equitable claim against Schradsky or in the judgment could he vest the county with the right or power to defeat the claim of Schradsky, or the plaintiff as her assignee, of his interest in the judgment, with the exception, which we shall discuss, that it might be otherwise if it should appear that the county took the assignment or made the settlement with Sullivan, without knowledge of the plaintiff's lien and claim, or notice that would put it on inquiry, from which knowledge thereof would result.

That a contract between attorney and client for payment of the attorney out of the judgment recovered or to be recovered operates as a binding equitable assignment of that fund *pro tanto*, and creates a lien upon the specific fund, is clearly held in *Terney v. Wilson, supra*, citing *Ely v. Cook*, and *Williams v. Ingersoll, supra*, and other authorities.

We think, and hold, that the common law lien created by such an assignment, of which the judgment debtor has notice, is in no wise inferior to the statutory lien of an attorney. Therefore, the status of a judgment debtor who settles the judgment with the judgment creditor, or anyone claiming under him, without regard to the lien of the attorney, does so at his peril in either case, and in that respect the principle announced by the authorities as to the statutory lien applies also to the common law.—*Custer v. Ferry Co.*, 5 Civ. (Proc. R. N. Y.) 146, affirmed without opinion in *Custer v. Same*, 98 N. Y. 660; *Peri v. N. Y. Cent. & H. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849, 850; *Louisville & N. R. Co. v. Procter* (Ky.) 51 S. W. 561; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 397; *Curtis v. Metropolitan St. Ry. Co.*, 118 Mo. App. 341, 94 S. W. 762.

2. Conceding, *arguendo*, but not deciding, that in order to sustain the plaintiff's suit, it was necessary for the board to have notice of plaintiff's equitable assignment of or claim against the judgment prior to taking from Sullivan the assignment of his interest in or settling the judgment with him, we think the proof offered by plaintiff was competent and amply sufficient to establish such notice. It was shown by uncontradicted testimony of the plaintiff and other witnesses that prior to the assignment, the chairman of the Board of County Commissioners was given actual notice of plaintiff's claim, and of the amount thereof, and that plaintiff would insist upon its payment, and that such information was obtained at a time when the said chairman and other members of the board were engaged as agents of the county in an attempt to settle said claim. The contention seems to be made that be-

cause this information was not given in writing, or communicated to the board while the members thereof were assembled as a board, it is not notice to the county. This contention, we think, is untenable. It is opposed to the doctrine of agency and the effect of information coming to agents as applied to individuals and corporations.— *D. S. P. & P. R. R. Co. v. Conway,* 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537; *Jaquish v. Town of Ithaca,* 36 Wis. 108, 111; *Lake v. Ingham,* 3 Vt. 158; Wharton on Agency, § 627; Clark & Skyles on Agency, vol. 1, §§ 481, 490, p. 1950; Clark & Marshall on Corporations, § 718, pp. 2194, 2205.

While it is true that the Board of County Commissioners is the designated agent of the county, it is likewise true that the board cannot hear except through the ears of the individual members constituting the board, nor see except through their eyes; that each of said members while acting for the county is an agent thereof, in a limited sense, to the extent, at least, that information coming to each member while acting for the county, may, for such purposes as are herein under consideration, be charged as notice to the county. Such seems to be the uniform holding of the courts as to notice coming to the officials of a municipality of defects in its streets and other matters while in the course of their employment (Mechem on Public Officials, § 846); and even though such notice come to the officials or agents while traveling the streets as private citizens.—*Rehberg v. New York,* 91 N. Y. 137, 43 Am. Rep. 657; *Carrington v. St. Louis,* 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; *Logansport v. Justice,* 74 Ind. 378, 39 Am. Rep. 79; *Cook v. Anamosa,* 66 Iowa, 427, 23 N. W. 907; Wade on Notice, §§ 682, 683.

We know of no reason why the same rule should not apply to members of a Board of County Commissioners. It would be preposterous to hold that the board did not know of matters pertaining to the subject matter here in dispute, when the members thereof obtained such information while discussing the question in attempting to settle the judgment as

agents for the county. We have stated that when plaintiff was offered as a witness to testify to the foregoing notice to the board, objection was made to his testimony, and the objection sustained, and thereafter the testimony was admitted, subject to being struck out on further consideration by the court. The same testimony was offered and given by the witness Leo Bach, and admitted over objection, but without a ruling on the objection. It is probable that both the court and counsel understood that Bach's testimony was also admitted subject to further consideration by the court. As to that, the record does not clearly show. After all testimony had been introduced, and as a part of its final conclusion, the court sustained the objection to the testimony offered by plaintiff. In this respect we think the court erred; but inasmuch as all this testimony is preserved by the bill of exceptions, and was not struck out until after both parties had rested and the cause submitted, and there is no intimation or suggestion that the board would have offered testimony controverting the same, we think the court may well regard the testimony as before the court, and undisputed, and order judgment accordingly.

But we have already held that, as to the board, plaintiff's rights in the judgment are of force and effect equal to the right of Schradsky, he being subrogated thereto, and that the board could not, without her consent, settle with Sullivan and thereby defeat the right of Schradsky, or plaintiff as her assignee, to compensation out of Sullivan's equity. We assume that further elaboration is not required to show that we recognize a clear distinction, essentially different in its effect on plaintiff's rights, between a purchase by the board from or settlement with Sullivan, who was not a party to the suit or judgment, and a settlement if made direct with the judgment creditor; and also fundamentally different in the requirements as to notice of plaintiff's share in the judgment, which Schradsky held in trust, and by every principle of equity was bound to protect. The mere fact that the judg-

ment was in Schradsky's name was sufficient notice to the world that payment of the judgment to anyone else was perilous.—*Ballinger v. Yates, supra.* It was not incumbent upon plaintiff, in support of his claim under the equitable assignment (as distinguished from his statutory lien also pleaded) to affirmatively show in chief that the board had notice of his claim. The board was charged with notice of such information as it would have gained by inquiry of the judgment creditor. Without making such inquiry, it may not be regarded as an innocent purchaser, in good faith and for value, and as such permitted to offset at one hundred per cent a mere equity which it admits it purchased at thirty per cent, when the effect of allowing such offset will be to defeat plaintiff's legitimate claim. We think, under the peculiar circumstances presented in this case, that want of notice after due inquiry, if material, was a matter of defense, and no proof thereof having been offered, the board cannot prevail on the question of notice, even though the testimony introduced by the plaintiff be disregarded. It might be otherwise if plaintiff's claim depended upon a statutory lien as attorney.

3. It is further contended that the board had been informed by plaintiff that his claim against Sullivan's interest in the judgment had been paid and satisfied prior to the time it accepted the assignment thereof (a tacit admission that the board knew of the claim). This contention is not supported by the evidence. Mr. Cavender, who was County Attorney at the time the assignment was taken, testified that "at or about" the time the assignment was taken, but whether a few days before or a few days after, he could not state, he inquired of plaintiff as to whether he had been paid for his services rendered Sullivan, and was informed by plaintiff that he had been paid. It does not appear that the Schradsky judgment was mentioned during that conversation. It is shown that Sullivan had other claims, in suit or in judgment, against the county in his own name, and that in such suits the plaintiff herein had been attorney for Sullivan. Plaintiff

testified that he did not understand that the County Attorney had reference to the Schradsky judgment. It is shown that at the time, plaintiff had not been informed that the county had taken an assignment or made settlement of Sullivan's interest in the Schradsky judgment, and it does not appear that he knew any such was contemplated; and the trial court found upon competent evidence that no settlement of plaintiff's claim or interest in the said judgment had been made. While there may have been, and doubtless was, a misunderstanding between the County Attorney and the plaintiff herein as to the settlement of plaintiff's claim against the Schradsky judgment, there is no reason why the effect of that misunderstanding should be charged to plaintiff, particularly in view of the fact that there is no showing that it was detrimental to the board. The board could not well be prejudiced by information of that character, coming to it after it had taken the assignment and made the settlement.

4. It was not necessary to make either Schradsky (the actual judgment creditor) or Sullivan (the equitable claimant thereof under Schradsky) a party to this suit.—*Louisville & N. R. Co. v. Procter,* (Ky.) 51 S. W. 561.

In view of the conclusions which we have reached as hereinbefore expressed, the judgment is reversed and the cause remanded to the District Court, with directions to enter judgment in favor of the plaintiff in accordance with the prayer of his complaint.

Reversed and Remanded.

Decided June 8, A. D. 1914. Rehearing denied July 13, A. D. 1914.

[No. 3972.]

PAGE ET AL. v. GILLETT.

1. DEED OF TRUST—*Recitations of Trustee's Deed.* The appointment of a trustee is not established by the recitations of his deed purporting to be in execution of the trust. (205)

A deed purporting to be executed by two as trustees is no evidence of their appointment, or of the death of a third person, named as third trustee. (207)

2. TRUSTEES—*Joint Must Act Jointly.* Where, in a private trust, there are several trustees, and all have accepted, and are acting, they must act as a unit, save where by the instrument creating the trust, or by statute, authority is given to a less number than the whole, or possibly in case of an emergency. Such authority, or such emergency, will not be presumed. (207)

3. CASES OVERRULED, *Distinguished or Explained.* The doctrine of *Carico v. Kling*, 11 Colo. App. 349, as to the effect of the recitations of a trustee's deed is against the weight of authority, and is not to be extended. (206)

The statement in the opinion in *Empire Co. v. Howell*, 22 Colo. App. 391, that "if defendant's title is bad he is not concerned with the defects in the trustee's deed, or the antecedent proceedings on which it is based," is too sweeping. Where, as in ejectment, the plaintiff is not in possession he is not to recover on the weakness of the adversary title. (208)

Error to Logan District Court. HON. H. P. BURKE, Judge.

MR. JOHN F. MAIL, MR. H. C. RIDDLE, for plaintiffs in error.

MESSRS. MUNSON & MUNSON for defendant in error.

CUNNINGHAM, P. J.

The facts necessary to a proper understanding of the issues involved in this case are simple, and so far as it is necessary to recite them are substantially as follows: Plaintiffs in error, claiming to be the owners in fee, by *mesne* conveyances from the government, of a certain tract of land, brought ejectment against defendant in error for the possession of the same, and introduced in evidence, as the last link in the chain connecting them with the title of said land, a trustee's deed in which they and the ancestor of certain of them were the grantees. This trustees' deed purported to be executed by two of three trustees, and recited the death of the third trustee. The only evidence of the appointment

of the trustees, or the authority under which they assumed to act, or the death of the one trustee, consisted of certain recitations in the trustees' deed. Unless these recitations fall within the doctrine laid down in *Carico v. Kling*, 11 Colo. App. 349, 53 Pac. 390, and numerous later cases of our own and the Supreme Court, to the effect that the recitals in a trustees' deed shall be *prima facie* evidence of the facts therein stated, then plaintiffs in error failed to prove title, and the trial court properly granted the motion of defendant in error, who was defendant below, for a non-suit, and its judgment in this behalf must be affirmed.

1. An examination of the authorities on this point has convinced us that recitals in an official deed, which it is no part of the officer's duty to make, are not evidence of the truth of the matters so stated; or, in other words, such recitals are *prima facie* evidence of the facts recited only in so far as they may be material to the execution of the trust by the trustee.—*Hill v. Reynolds*, 93 Maine 25, 44 Atl. 135, 74 Am. St. 329; Devlin on Deeds, sec. 425.

Even under statutes giving such recitals evidentiary effect, such statutes apply only to those matters which are required to be recited.—4 Encyclopedia of Evidence 184. Our conclusion, it is believed, is not in conflict with any prior decision of the Colorado courts of last resort, in all of which the trust deed from which the trustees' deed sprung had been introduced in evidence. In *Lithgow v. Pearson*, 25 Colo. App. 70, 135 Pac. 763, we approved and followed the ruling in *Dyer v. Marriott*, 89 Kans. 515, 131 Pac. 1185, 45 L. R. A. (N. S.) 93, that:

"When one attempts to derive title to land through the heirs of a former proprietor, the fact of heirship must be proved. This cannot be done by a recital, merely in the deed, especially where the deed is of recent date, which, at most, amounts to a mere claim of heirship."

In *Carico v. Kling*, *supra*, the case of *Beal v. Blair*, 33 Ia. 318, is cited and relied upon. But in *Lawless v. Stamp*, 108

Ia. 365, 79 N. W. 365, the Iowa Supreme Court distinguishes the *Beal* case, and ruled that where a deed of conveyance by the receiver of a corporation is offered in evidence, containing recitals of his appointment as receiver, an order of court of sale, and the fact of sale, and the endorsement of approval on the deed signed by the judge, these recitals were not evidence of the facts recited as against the defendant, who was a stranger to the title which the receiver's deed purported to convey. The defendant in the instant case claimed title through certain tax deeds, and was therefore a stranger to the title under which the plaintiffs claimed. The rule laid down in *Carico v. Kling* is believed to be against the weight of authority, and for that reason, if no other, ought not to be extended. The general rule seems to be that,

"Except by statute, the recitals in a deed by a public officer are not primary evidence of the facts therein contained as against strangers thereto."—4 Encyclopedia of Evidence 184.

We know of no reason for giving greater weight to recitals in a trustees' deed than in a deed of a public officer, even if it be granted that a trustee is not a public officer, or to the recitals in a warranty deed. In a warranty deed the recitals essential to a valid conveyance are *prima facie* evidence of the facts thus stated, but beyond this point they possess no probative value. It is stipulated in some trust deeds that the recitals made in any trustees' deed which may result from a sale under the trust deed shall be *prima facie* evidence of the facts therein stated, but the effect of such a stipulation in a trust deed we are not called upon to determine, since, as we have already observed, the plaintiffs introduced no trust deed or other instrument evidencing the appointment of the trustees, their immediate grantors.

2. Since the recitations by the two trustees who purported to act in this case that the third trustee had deceased is not proper evidence of that fact, it becomes necessary to determine what, if any, title was conveyed to the plaintiffs by

the trustees' deed which two of the three trustees assumed to execute and deliver to them.

"In the case of a private trust, as distinguished from a public or charitable trust, where there are several trustees and all have accepted and are exercising the office, their powers, interest, and authority are equal and undivided; they cannot act separately, but must act as a unit, except where authority to act is given to a majority of the trustees by statute, or by the instrument creating the trust, or, possibly, except in the case of an urgent emergency."—39 *Cyc.* 307.

There was no allegation or proof that the third trustee who did not sign the trustees' deed on which the plaintiffs rely had not accepted the trust, nor is there any evidence that authority had been given to a majority of the three trustees to convey the property, nor was there any evidence of an urgent emergency.

In *Loveland v. Clark,* 11 Colo. 265, 18 Pac. 544, it is said: "Undoubtedly where the grant is to two or more trustees, all must join in the execution of the trust, unless it shall be otherwise provided."

Where there are several trustees, all must act and join in the deed.—39 *Cyc.* 364.

"It is clear that the conveyance by one of the trustees, while the other trustee was acting as such, would not pass the legal title to the premises."—*Learned v. Welton,* 40 Calif. 349; 27 *Cyc.* 1461.

Mr. Beach thus states the rule:

"Where an estate is vested in two or more trustees it is their duty to act as a body. Where there are only two the act of one is void, and the same rule applies to the act of the majority where there are more than two co-trustees. In the creating of the trust there is a confidence reposed in all the members of the body of trustees, and the estate is conveyed equally to all. The title vests in the trustees, not as individuals, but as a body. Hence it becomes the duty of each and all of the trustees to unite in the execution of the

trust. The beneficiaries are entitled to the united judgment or discretion, and to the united action of all the members of the body."—Beach on Trusts and Trustees, vol. 2, sec. 493; *Ridgeley v. Johnson,* 11 Barb. 527.

"Where a settlor vests his property in several co-trustees they all form, as it were, one collective trustee; therefore they must perform their duties in their joint capacity. * * * A deed of land executed by one trustee does not convey his share, as in the case of ordinary joint-tenants. Where a deed was executed by two of three trustees, the burden was put upon the purchaser to prove that the other trustee was dead."—Perry on Trusts (5th ed.), vol. 1, secs. 411-412; *Bumgarner v. Cogswell,* 49 Mo. 259; *Wilbur v. Almy,* 12 How. (U. S.) 180, 13 L. Ed. 944; *Sinclair v. Jackson,* 8 Cowan 543; *Ham v. Ham,* 58 N. H. 70; *Taylor v. Dickinson,* 15 Ia. 483.

In *Ham v. Ham, supra,* it is said:

"One of two joint trustees cannot, without the consent of his co-trustee, convey or pledge the trust property; and a person taking such conveyance or pledge, with notice of the trust, acquires no title to the property against the trustee."

3. Counsel for plaintiffs call our attention to certain language used by this court in *Empire Ranch & Cattle Company v. Howell,* 22 Colo. App. 391, 125 Pac. 592, wherein we said, in effect, that "if the defendant's claim of title is bad, then he is not concerned with the defect, if any, in the trustee's deed, or the antecedent instruments and proceedings upon which it is based." Upon reflection we are persuaded that the language used in that case was too sweeping. Similar language is used in *Foster v. Clark,* 21 Colo. App. 192, 121 Pac. 130. The Foster case was an action to quiet title, wherein the plaintiff, claiming to be the owner of the fee, was in possession; but where, as in ejectment, the plaintiff is not in possession; and where he fails to prove any title in himself, he cannot recover upon the weakness of his adversary's title.

For the reasons given above, the judgment of the trial court is affirmed.

Judgment Affirmed.

[No. 3705.]

SEBOLD V. RIEGER ET AL.

1. APPEAL AND ERROR—*Presumptions.* What appears in the record as to matters of fact is to be viewed in the light most favorable to the successful party. (210)

2. EASEMENTS—*By Prescription.* Land owner "gave" the right of way over his lands for a lateral ditch, to enable a neighbor to conduct water to the lands of the latter for the irrigation thereof, and assisted in the excavation of the lateral. The lateral was maintained and enjoyed for twenty-five years, or thereabouts, without question or objection. *Held,* the title thereto was as complete as if acquired by purchase or condemnation. (210, 211)

3. —— *Servient Tenement—Right of Owner.* The owner of lands over which another has acquired an easement to maintain a lateral ditch, for the irrigation of his lands, is not, merely by his property in the servient tenement, entitled to divert water from such lateral, to the prejudice of the owner of the dominant tenement. Secs. 3170, 3171 of the Revised Statutes have not the effect to confer such right. (210, 211)

Whether by proceeding under the statute the right to enlarge the lateral may be acquired, not decided. (211)

4. EVIDENCE—*Burden of Proof.* Where a land owner asserts the right to divert water from the lateral ditch of another, across his lands, he has the burden of proving that such diversion will not be injurious to the proprietor of the lateral ditch. (211)

5. NEW TRIAL—*Newly Discovered Evidence.* Motions for a new trial on the ground of newly discovered evidence are viewed with suspicion. The denial of such a motion will not be reviewed except for a gross abuse of discretion. (213)

The affidavits must show the efforts made by the applicant to locate the additional witnesses proposed to be examined, and must exclude all inference of delay or neglect on the part of the applicant. (212)

Evidence as to matters not contraverted on the trial will not suffice. (212)

Appeal from Weld District Court. HON. JAMES E. GARRIGUES, Judge.

MR. JOHN C. NIXON, MR. THOMAS A. NIXON for appellant.

MR. JOHN T. JACOBS for appellees.

CUNNINGHAM, P. J.

Rieger, who was the plaintiff below, and Sebold, who was the defendant, owned adjoining farms in Weld County, which drew their water for irrigation purposes from the same source, or main ditch. Rieger's land was watered by a lateral ditch which crossed Sebold's land, and could be watered in no other way. Defendant insisted upon the right to take water for a portion of his land from the lateral which had been constructed across it by Rieger for the use of the latter's land. This led to serious difficulty, and various lawsuits, some criminal in their nature. Finally plaintiff brought this action to quiet his title in the lateral ditch, his wife being joined with him, for what purpose we are not advised. Sebold answered, and in a cross-complaint asked that he be adjudged to be a joint owner of the lateral ditch in question. From a judgment in favor of Rieger, excluding Sebold from all right to the use of the lateral ditch, the latter brings the case here for review.

1. The facts, viewed in the light most favorable to Rieger, as it is our duty to regard them, show that the lateral ditch was constructed across the Sebold land in the early eighties, something like twenty-five years before Sebold acquired title to it, and during all that time said lateral was used by Rieger and his predecessors in title, for irrigation of the latter's land. Previous owners of the Sebold land had used water from the lateral ditch, but for the purpose of irrigating only an acre or so of high ground near the Sebold house; at least two of the previous owners of the Sebold land, who had owned it for eight and three years, respectively, testified that they always understood that Rieger owned the ditch, and that they only used water from it with his consent. Indeed, one of these owners testified that he had helped a former owner of the Rieger land construct the ditch, in 1882, in order to somewhat change its course, and that *he gave the right of way to the then owner of the Rieger land*. This witness had owned the Sebold land for eight years after the lateral ditch was thus constructed. Apparently, im-

mediately upon acquiring the land, Sebold insisted upon using the ditch whenever he pleased, without the consent of Rieger, and upon something like twenty-five acres of land. There is no evidence to show that the capacity of the lateral ditch is sufficient to accommodate any considerable amount of the Sebold land, without interfering with the rights or requirements of Rieger. Rieger's right in the ditch, under the testimony as just related, was as complete as if his grantors had purchased the right of way, or acquired it by condemnation. The question of the right of Sebold, under the statutes, to enlarge the ditch and thus avoid the construction of a parallel lateral (if one be necessary) is not involved in this case, and by nothing that we have said or shall say is it intended to question any right he may have to pursue the statutory course for acquiring a right to use the lateral ditch. If the ditch, as now constructed, is of sufficient capacity to serve the needs of Rieger, and also the demands of Sebold, the duty was upon Sebold to establish that fact by evidence, under proper pleadings; this he made no attempt to do. The learned trial judge found that it was practicable to irrigate all of the Sebold land without resort to this lateral, which had been originally constructed by a remote grantor of Rieger, and which for more than twenty-five years had been continuously used by the owners of the Rieger farm. Indeed, the evidence discloses that there was, at the time of the trial, a parallel lateral owned and controlled entirely by Sebold; and there is evidence tending to prove that this lateral could, with a trifling expenditure of time, be made to cover all the Sebold land that could be supplied from the Rieger lateral. Counsel for appellant rely upon sections 3170 and 3171 R. S., which manifestly are not applicable to the case made; and they insist, "that an owner of the servient estate [Sebold, in this case] may always use an easement in any manner not inconsistent with the dominant use thereof." If this be conceded, still the owner of the servient estate who seeks to invoke this rule must prove that the use which he proposes to make of the

easement is not inconsistent with, or injurious to, the dominant use thereof.

2. Complaint is made of the action of the trial court in denying the motion of defendant for a new trial, which motion was based largely upon newly discovered evidence. We think appellant's showing as to diligence in the attempt to discover, before the first trial, the evidence he proposed to use on a second trial was insufficient under the following authorities: *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284; *Lee-Kinsey Imp. Co. v. Jenks*, 13 Colo. App. 265, 57 Pac. 191.

Moreover, much of the testimony which appellant profused to introduce was not important, since it went to matters not controverted on the trial, or to matters that might as well have been proven by other witnesses. All the witnesses that defendant seeks to use on a second trial lived in Jefferson County or in Denver, and apparently were permanently located. One of the most important witnesses, if we may judge by his affidavit, was the son of a witness who testified on the trial in this case; hence, his whereabouts, presumably, could have been easily ascertained by appellant had he inquired of the father, who was present at the trial. By defendant's own affidavit, which he filed in support of his motion for new trial, he knew of the importance of the testimony of all the witnesses that he desired to use, and knew their names. He does not set forth in his affidavit what efforts he made, prior to trial, to locate them, nor did he make any effort to have the trial postponed for that or any other purpose. All but one of the witnesses which appellant claims to have discovered were previous record owners of the land, and he states, in his affidavit for new trial, that he took their names from the abstract of title to his land, *before the trial*, thus indicating plainly that he appreciated the importance of their testimony which, so far as material, went to the question of the previous use and repair of the lateral ditch by prior owners of his land. Furthermore, within a very few days after appellant had lost his case, he was able to locate all of

the witnesses which he desires to use on a second trial.—*29 Cyc.* 892. The trial was had on February 18th. On March 8th and 9th he had discovered all these witnesses.

"Motions for new trials, based upon newly discovered evidence, are regarded with suspicion and disfavor, and are left to the sound discretion of the trial judge whose action in denying such motions will not be reversed except for gross abuse of discretion."—*29 Cyc.* 881; Baylies New Tr. & Apps., pp. 527-529; Spellings New Tr. & App. Proc., vol. 1, §§ 206-209-221; 14 Enc. Pl. & Pr., 790-799; Haynes New Tr. & Apps., p. 250, § 87; *Arnold v. Skeggs,* 35 Calif. 684; *Baker v. Joseph,* 16 Calif. 180.

In *Baker v. Joseph, supra,* it is said:

"The temptations are so strong to make a favorable showing after a defeat in an angry and bitter controversy involving considerable interests, and the circumstances that the testimony has just been discovered, when it is too late to introduce it, so suspicious, that courts require the very strongest showing of diligence and all other facts necessary to give effect to the claim."

Judgment Affirmed.

[No. 3953.]

STRAUSS V. THOMAS.

1. EVIDENCE—*Possession of Lands. Bill to Quiet Title.* A warranty deed, executed by one in possession, purporting to convey the lands, in fee, to plaintiff, with possession following thereunder, is *prima facie* evidence of title in fee in the plaintiff, and casts upon the defendant the burden of dispelling the *prima facie* title so exhibited. *Clark v. Huff,* 49 Colo. 197, distinguished. (215)

2. QUIETING TITLE—*Plaintiff's Title.* Plaintiff is not required to show a perfect indefeasible title; but he must show both possession and a *prima facie* title. (215)

The declaration in *Lougee v. Wilson,* 24 Colo. App. 71, that upon plaintiff's proof of possession, or constructive possession, the burden is upon defendant to prove title, as in ejectment, declared *obiter,* and reconsidered. (217, 218)

Mitchell v. Titus, 33 Colo. 386, *Eagan v. Mahoney,* 24 Colo. App. 285. *Mitchell v. Trowbridge,* 47 Colo. 6, explained. (217)

Error to Gunnison District Court. HON. CHAS. MCCALL, Judge.

MR. B. C. HILLIARD, MR. J. R. ALLPHIN for plaintiff in error.

MR. SPRIGG SHACKELFORD, MR. E. M. NOURSE for defendant in error.

KING, J., delivered the opinion of the court.

Plaintiff in error brought his action to quiet title, alleging that he was the owner in fee simple, and in possession, of certain real estate, and that defendant claimed some interest therein adverse to plaintiff, which interest so claimed was without right or foundation. Defendant put in issue the ownership of the land by plaintiff, but admitted his possession, and alleged that defendant was, and since the 20th day of May, 1907, had been, the owner of the property in fee simple derived from a treasurer's tax deed recorded on the date last above named, and from a subsequent treasurer's deed recorded February 1, 1910, made for the purpose of correcting errors and supplying omissions in the former deed; alleged that plaintiff's pretended title was derived from a tax deed executed November 17, 1898, and that said deed was void on its face, and for reasons *aliunde*. The replication alleged that the defendant's tax deed was void on its face, and for reasons *aliunde*, and put is issue other matters alleged in the answer and cross-complaint. In making the allegation of the invalidity of the defendant's tax deed dated February 1, 1910, the plaintiff set out the said deed *in haec verba*.

The plaintiff offered, as evidence of his title, three certain deeds—(1) a quitclaim deed from Hoffman to Ramsey, dated May 13, 1905; (2) a quitclaim deed from Ramsey to Bemis, dated May 29, 1905; (3) a warranty deed from Bemis to Strauss, plaintiff in this case, dated May 8, 1908, all of which deeds were duly recorded. He also proved that from about July, 1905, down to the time of the trial, plaintiff and his

grantor Bemis had been in the actual possession of the said property. No other evidence was offered either by the plaintiff or the defendant. Upon motion of the defendant, nonsuit was granted and the action dismissed at plaintiff's costs.

1. The plaintiff having proved that from July, 1905, long prior to the inception of the tax title pleaded by the defendant, Bemis was in the actual possession of the lots in question, as owner thereof, and thereafter while in possession made her warranty deed purporting to convey the same in fee to the plaintiff, and that thereupon the plaintiff took and remained in possession from the date of said deed to the time of the trial, his proof was *prima facie* evidence of his ownership in fee.—*Mitchell v. Titus*, 33 Colo. 386, 80 Pac. 1042; *Mitchell v. Trowbridge*, 47 Colo. 6, 105 Pac. 878; *Eagan v. Mahoney*, 24 Colo. App. 285, 134 Pac. 156; *Detlor v. Holland*, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266; *South Chicago B. Co. v. Taylor*, 205 Ill. 132, 68 N. E. 732; *Graton v. Holliday*, 189 Mo. 322, 87 S. W. 37; *Gage v. Cantwell*, 191 Mo. 698, 91 S. W. 119; *Weeks v. Cranmer*, 17 S. D. 173, 95 N. W. 875, and was sufficient in this action to cast upon defendant the burden of showing the invalidity of plaintiff's *prima facie* title; that it was derived from a void tax deed as alleged in the answer, or to prove title in himself which would extinguish the plaintiff's title.

2. The plaintiff was not required to show a perfect and indefeasible title or a connected chain of title from the government or from the state, if, as alleged in the answer, his title was derived from the state through a treasurer's tax deed, in order to make a *prima facie* case. *Webster v. Kautz*, 22 Colo. App. 111, 123 Pac. 139; *South Chi. B. Co. v. Taylor, supra; Detlor v. Holland, supra.* In *South Chi. B. Co. v. Taylor,* it was said:

"If the title of appellee was good as against appellant she had a right to have a cloud held by appellant removed, and if she showed title by connected chain of conveyances from Bowen, who was in possession in 1871 under a deed purport-

ing to convey title, her title would be superior to that derived under a subsequent invalid tax deed. * * *

"If appellee showed a good title as against appellant, it was not concerned with the question whether she showed a perfect or connected chain of title from the government. * * * It is not necessary that he show title from the government, but he must show title in himself superior to the alleged cloud."

And in *Detlor v. Holland* the court said:

"In an action to quiet title, if the plaintiff shows peaceable possession under a conveyance, even though defective, and the defendant shows no title or right, the plaintiff is entitled to have his title quieted as against such defendant and those claiming under him."

3. Defendant in error relies with confidence upon the decision in *Clark v. Huff*, 49 Colo. 197, 112 Pac. 542, and also cites *Wall v. Magnes*, 17 Colo. 476, 30 Pac. 56; *Empire R. & C. Co. v. Webster*, 52 Colo. 207, 211, 121 Pac. 171; *House v. Grable*, 25 Colo. App. 405, 138 Pac. 1012.

We think it futile to attempt to harmonize all conflicts between different decisions of this court or of the Supreme Court (especially those rendered in department) upon matters pertaining to tax titles, or to distinguish between cases apparently in conflict, some of which appear to support the judgment of the trial court, and others which are unquestionably opposed to it. However, in *Clark v. Huff*, while the plaintiff relied upon proof of possession under deeds from a tax title holder, which deeds alone and unimpeached perhaps might have been sufficient to make a *prima facie* case, sufficient to put the defendant upon proof, if the plaintiff had not offered the tax deed in evidence, it appears that the plaintiff made the offer of a tax deed from which source he claimed to derive title, and this deed was shown and held to be void on its face, and this it seems was regarded as sufficient to defeat his claim of title under the chain dependent upon the tax deed. This

fact, of itself, distinguishes the case of *Clark v. Huff* from *Mitchell v. Titus*, *Mitchell v. Trowbridge* and *Eagan v. Mahoney*, in each of which cases the plaintiff made no attempt to connect his deed with the ultimate source of title, whether from the government by patent or the state by tax deed, but relied upon possession coupled with a conveyance from a person who was himself in possession under claim of title through a conveyance at the time he made the deed. Whatever may be the conflict, or apparent conflict in the decisions, the judgment in this case is overthrown by a continuous course of decisions entirely in point. It is not held in *Wall v. Magnes*, nor in *House v. Grable*, that in an action of this kind, when defendant has shown by his answer that he asserts such an interest, legal or equitable, adverse to the plaintiff, as sustained by proof, would entitle him to relief in connection with the property, plaintiff must prove an indefeasible title, but that, under such pleadings, "plaintiff must by competent evidence prove title, legal or equitable, in himself." In the case at bar, the conveyances by which plaintiff attempted to show title were competent, and, under the authorities here cited, when coupled with actual possession, were *prima facie* sufficient.

4. Plaintiff in error, in support of his contention, quotes the following from *Lougee v. Wilson*, 24 Colo. App. 71, 131 Pac. 777:

"It may be deduced from the foregoing authorities, that in the code action to quiet title, if defendant has denied the allegations of the complaint, and pleaded an adverse title, valid on its face, the plaintiff, to sustain the issues, must produce sufficient proof, only, to show possession, or in case of vacant and unoccupied land, a title sufficient on the face thereof to show constructive possession; thereafter the burden is upon the defendant to prove title as in ejectment, or in the code action for possession and damages, and, failing to prove a valid title, judgment would follow for the plaintiff, as defendant would be in no postion to attack the proof."

In view of the foregoing citation, relied on as a precedent in this case, and of the possibility of a new trial, we believe it necessary to revise the expression of our views as found in the paragraph quoted, although said paragraph is introduced by way of argument, and is *obiter*. In that opinion, we had reference particularly to the order in which proof should be introduced, as well as to the nature and *quantum* thereof, requisite to make a *prima facie* case for the plaintiff under the issues. However, the rule in many of the states is that the plaintiff, in order to make a *prima facie* case, must prove title, legal or equitable, coupled with possession, and such is the settled rule in this state. In *Wall v. Magnes, supra*, the court ruled that in order to maintain this statutory action, plaintiff must aver and prove his possession, *coupled with title*, legal or equitable, and in support thereof cited *Stark v. Starrs*, 6 Wall. 402, 18 L. Ed. 925. In the last named case, the Supreme Court of the United States, having under consideration the precise question we are discussing, upon a similar code provision, said:

"We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession, by himself or his tenant, may maintain' the suit. His possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs, and, perhaps in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

That the Supreme Court of this state has not deviated from this rule is proven by the following excerpt from an opinion by Mr. Justice Musser in *Lambert v. Murray*, 52 Colo. 157, 120 Pac. 415 (a suit to quiet title):

"Under all the decisions of this court, the assertion of an adverse title in the defendant, with a specification of its

nature, coupled in the same defense with denial of the possession of the plaintiff (if such a denial is necessary), is sufficient to put the plaintiff upon proof of his title and possession, and, under such circumstances, the proof of the one is as necessary for the maintenance of the action as the proof of the other."

See also *Empire R. & C. Co. v. Webster,* 52 Colo. 207, 121 Pac. 171. In the last case cited, the court, by Mr. Justice Bailey, made a very pointed suggestion that the requirements of *Mitchell v. Titus,* 33 Colo. 385, viz., that proof of possession in plaintiff under a deed from a former owner while in possession, were meager, and that the liberal rule there announced should not be further relaxed.

Under these decisions, we think the rule firmly established in this state that both possession and *prima facie* title must be proven by the plaintiff before the defendant can be required to produce evidence in support of his claim of an adverse right.

5. The trial court seems to have been influenced by its erroneous opinion that the decision in *Mitchell v. Trowbridge, supra,* was controlled by the plea of the statute of limitations. The record shows that such was not the case. The testimony mentioned in the first paragraph of that case, relative to the collection of rents for the period of eight or nine years, was offered with reference to ownership and possession of the premises, and the first syllabus indicates the view of the reporter of the title, not having been connected with the ultimate source of title, was color of title, rather than perfect and indefeasible title. Neither in *Mitchell v. Titus* nor *Eagan v. Mahoney* was the decision affected by the plea or proof of the statute of limitations.

Reversed and Remanded.

CUNNINGHAM, P. J., and JUDGES HURLBUT and BELL concur. MORGAN, J., concurs in result.

[No. 3969.]

GRIFFING V. SMITH.

1. SUMMONS—*Requisites—Statement of Demand.* Under Secs. 36, 41, of the Revised Code a summons not stating the sum demanded, but that the action is "brought to recover salary for services as foreman," at a mill named, during a period mentioned, and referring to the complaint for a more particular statement, is sufficient to sustain a judgment entered by the court, upon evidence heard, after a default entered by the clerk. Whether sufficient to sustain a judgment by default, entered by the clerk. Query? (221, 223)

2. STATUTES—*Construed.* Where the clerk merely enters the default of the defendant, the first clause of sec. 185 of the code has no application. (224)

Where there is upon file a verified and sufficient complaint, and the defendant has been duly summoned, and fails to answer within the time allowed to him, the court has full control of all subsequent proceedings, and though no sum is named as demanded in the summons, may give judgment in favor of plaintiff for the amount to which he is entitled, not exceeding what is set down in the complaint. The provisions of sec. 185 of the code empowering the clerk to enter judgment by default in certain actions were not intended to impair the powers of the court. (224)

Error to Dolores District Court. HON. CHARLES A. PIKE, Judge.

MESSRS. ADAMS & HOGG for plaintiff in error.

MR. GEORGE W. LANE, MESSRS. DAYTON & DENIOUS and MR. FRANK A. PETTIBONE for defendant in error.

MORGAN, J.

Error to the Dolores District Court by defendant in lower court, to reverse a judgment by default in favor of the plaintiff, on a summons issued by clerk August 9, service and return August 11, and a complaint verified and filed August 12, 1910. Default entered by the clerk April 10, and judgment entered by the court at the March term on May 9, 1911.

Two questions are presented by the assignments of error.

First, it is contended that the court erred in overruling a motion to quash the summons and the service thereof.

Second, that the court erred in rendering judgment by default, whereas, it is claimed that the Code of Civil Pro-

cedure provides that the clerk alone could enter the judgment.

Under the first contention it is claimed that the summons was so defective (because it did not contain a statement of the sum of money demanded), that it did not give the court jurisdiction of the defendant and should have been quashed. Prior to 1889, the Code of Civil Procedure required, without any remedial provision, that the summons, "shall, if a copy of the complaint be not served therewith, or if the service be by publication, briefly state the nature of the action, and the sum of money or other relief demanded;" but, prior to the commencement of this action, this section was amended by omitting part thereof and inserting a remedial provision, so that it now reads as follows: "shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading," and providing that the form of the summons shall be the same in all cases. Section 34, Mills. Ann. Code, (sec. 36, Code of Civil Proc. Rev. St. 1908). While the summons herein did not state the sum of money demanded, it did state that "the said action is brought to recover salary for services as foreman of the Pro Patria mill at Rico, Colorado, in 1906 and 1907, as will more fully appear from the complaint in said action to which reference is here made." Whether such a summons under the law prior to the above amendment would have been incomplete because not stating the sum of money demanded is a question wholly unnecessary to consider here, and decisions of this court prior to such amendment are not controlling. The defect in the summons is cured by the amendment aforesaid. It comes within the liberal terms and the remedial intention thereof. The summons should state the sum of money demanded, but the lack of this statement was not such as to render the summons wholly insufficient under the amendment aforesaid, nor did it cause the summons to be misleading in any respect. The amendment covered

just such a summons by providing that it shall not be considered void or erroneous on account of the insufficient statement, unless it is manifestly misleading. Furthermore, sec. 41 of the Code of Civil Procedure, Rev. St. 1908, provides that the code provisions shall be liberally construed and that "no service of summons shall be set aside or quashed for any technical error, defect or omission, either in the summons or the service of the summons, which error, defect or omission does not affect some substantial right of the defendants therewith served."

This amendment has been considered and construed in the case of *Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730, decided subsequent to the amendment of 1889, in which case a default was entered similar to the facts herein, and in that case the court said:

"The summons in this case cannot be considered *manifestly misleading* in respect to the statement of the relief demanded. The statement was correct so far as it went; besides it pointed directly to the complaint where the relief demanded was fully stated. The want of a more definite statement in the summons did not, therefore, render the summons *void* or *erroneous;* the statement was not *misleading.*"

The court made the following statement also in that case that is peculiarly applicable here and ought to serve for all time as a useful and beneficial warning to counsel in all cases to refrain from technicalities that do not affect the substantial and actual rights of their clients:

"Mere dilatory motions based upon special appearances are not favored under the present practice. It is the policy of the code that all of its provisions shall be liberally construed with the view to assist parties in obtaining justice, and that errors and defects in pleading or proceedings, not affecting the substantial rights of the parties, shall be disregarded by the courts on appeal or error as well as at *nisi prius,* code, sections 78 and 443. *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895." See also *Rich v. Collins*, 12 Colo. App. 511, 513.

The case of *Farris v. Walker*, 2 Colo. App. 450, decided also since the amendment aforesaid, and held not to be in point in the *Burkhardt case*, may be distinguished in the same way here, with the further distinction that the court's notice in that case was not specially called to the amendment of 1889, above quoted. It is further claimed that the *Burkhardt* case is not controlling here, because in that case the action was for damages for the wrongful taking of certain goods and chattels, while in this case the action is on a contract for the recovery of money; and that, as section 185, Code of Civil Procedure, Rev. St. 1908, provides, that judgment by default shall be entered by the clerk "for the amount specified in the summons;" in actions of the latter kind, the summons must state the sum of money demanded, and that the clerk must look to the summons, alone, for such information without reference to the allegations or prayer of the complaint, although it be on file at the time. Even if this be true as the entry of *judgment* by the clerk, it is not true as to the entry of *default*. And there is no imperative reason, *so far as the service and notice* and the *entry of default* is concerned, why the summons should state the sum of money demanded in this case that would not be equally imperative in a case like *Burkhardt v. Haycox*. This contention, therefore, can be applied only to the lawful power of the clerk to enter the judgment, and as the clerk did not enter the judgment in this case, but only entered the default, such contention fails for lack of application.

The second contention under the assignments of error seems to be based principally upon that section of the code (sec. 185, Code of Civil Proc. Rev. St. 1908), that provides that "in actions arising upon contract for the recovery of money or liquidated damages only, * * * the clerk shall * * * enter judgment for the amount specified in the summons;" and the contention is that the *clerk* must enter the judgment, and that, in such action, the judge or the court has no power or authority to do so, or, if so, the judge of the

court must be governed in rendering the judgment by the sum specified in the summons, and that, as no sum was specified therein, no judgment could be given, rendered or entered. As it has been concluded that the summons in this case was sufficient under the amendment aforesaid to bring the defendant into court and to give the clerk authority to enter the default, it necessarily follows that the court had jurisdiction over the defendant when the time expired within which he was given to plead further. Sec. 44 Mills' Ann. Code; sec. 50 Code Civil Proc. Rev. St., 1908. Therefore, the court at the time the judgment was rendered had full power in the premises, and "control of all subsequent proceedings," as it is not disputed that it had jurisdiction of the subject matter. The code provision empowering the clerk to enter judgment by default in certain actions was never intended to deprive the court of its power to render a judgment, but only to give the clerk authority to enter it. It is unnecessary even to discuss the point made as to the constitutional power of the legislature to deprive the court of such right, because it is plain that the legislature did not intend any such thing. The record discloses that the complaint was on file, duly verified, when the default was entered by the clerk on April 10, and afterwards on May 10, 1911, the matter came on before the court in regular session at the regular term of court, and that it heard the testimony of the plaintiff's witnesses (and necessarily had the summons and complaint before it), and that, on the latter date, it rendered judgment in favor of the plaintiff on the default and the proof for the full amount demanded in the complaint. The court duly followed the next section of the code (186) by rendering a judgment for no greater amount than was demanded in the complaint. *Russell v. Shurtleff*, 28 Colo. 418, 65 Pac. 27, 89 Am. St. 216. This was the most regular, fair and lawful way for the court to proceed and there was no error therein.

The technicalities on which this writ of error is based are hardly worthy of the attention that has been given to them.

There are, in rare instances, cases in which special appearances may be made, as, where the defendant is not a resident of the county where the summons is served upon him, and possibly in other instances, but this is not one of such cases. No excuse is discovered, furthermore, for the objection as to the rendering of judgment by the court, after the motion to quash the summons had been heard and denied, and the complaint duly verified and filed. Such action by the court, instead of by the clerk was, certainly, not prejudicial to defendant, and entirely within the jurisdiction and power of the court. Counsel should give greater heed to repeated efforts of the legislature to simplfy the code, and rid it of such possible technicalities; and to the words of the court above quoted in the *Burkhardt v. Haycox* case; and attention is called, here, to the following from Brown on Jurisdiction, page 210: "Courts are opposed to the practice of having one appear to tell them he is not there."

Judgment Affirmed.

[No. 3985.]

EMPIRE RANCH & CATTLE COMPANY v. MCPHERIN.

1. TAX TITLES—*Void Deed.* A treasurer's deed reciting the sale of non-contiguous lands *en masse,* for a gross sum, is void upon its face. (227)
So, a deed which recites a sale to the county and an assignment of the certificate by the clerk, more than three years after its issuance. (227)

2. QUIETING TITLE—*After Acquired Title.* A title acquired after the institution of the action does not avail. (227)

3. EVIDENCE—*Admissions in Pleading—Bill to Quiet Title.* Answer setting up certain tax deeds and pleading the five years' statute of limitations. Reply that the deeds show a non-compliance with the statute, "and by reason thereof are wholly void." *Held* not to dispense with the production of the deeds. (226, 227)

4. LIMITATIONS—*Color of Title—Payment of Taxes.* To give advantage of the seven years' limitation (Rev. Stat. Sec. 4089) seven years must intervene between the first payment of taxes and the institution of an action by the holder of the paramount title. (227, 228)

5. TRUST DEED—*Recitations of Trustee's Deed,* are *prima facie* proof of the matters recited. (228)

6. APPEALS—*Technical Objections,* will not avail where upon the whole record it appears that substantial justice has been accomplished. (228)

Error to Washington District Court. HON. H. P. BURKE, Judge.

MR. R. H. GILMORE for plaintiff in error.

MESSRS. ALLEN & WEBSTER for defendant in error.

BELL, J.

Action was brought in the District Court of Washington County, under sec. 255, Mills' Ann. Code, December 30th, 1908, by defendant in error to quiet his title to the S. E. ¼, sec. 25, tp. 5 S. R. 49 W. of the 6th P. M. The case was tried to the court without a jury and resulted in a decree quieting the title to the premises in the defendant in error, upon his paying to the clerk of the court, within 60 days from the date of the decree, for the use and benefit of the plaintiff in error the sum of $108.91, the amount of taxes, penalties and interest found due it. The plaintiff in error set up and deraigned a fee simple title in himself from the United States. The defendant in error relied upon two tax deeds, which were alleged in the replication to be void upon their faces and "show a non-compliance with the laws of the State of Colorado, regarding the sale of lands for delinquent taxes, and by reason thereof, are wholly void and form no basis for any plea of the five years' statute of limitation." The further defenses set forth in the answer were the five and seven-year statutes of limitation, and the laches of the defendant in error in the institution and prosecution of his action.

Plaintiff in error contends that the replication, after setting forth a general denial of the new matter contained in the answer, admits affirmatively by implication the issuance, delivery and recording of the two tax deeds and does not allege any fact in avoidance of them, but simply states matters which are conclusions of law, and that, therefore, the tax deeds were admitted without being put in issue. It is unnecessary for us to dwell upon the point thus urged, as it has been decided to the contrary in the cases of *The Empire*

Ranch & Cattle Co. v. Patterson, 24 Colo. App. 395, 133 Pac. 1125, and *The Empire Ranch & Cattle Co. v. Langley,* 23 Colo. App. 49, 127 Pac. 451.

But one of the tax deeds was offered in evidence by the plaintiff in error, and was received as color of title only. This deed was issued to one H. Emerson and recorded October 10th, 1894, and is void upon its face in that it shows that the lands therein attempted to be conveyed together with other non-contiguous tracts were sold *en masse* for a gross sum: *Johnson v. Gibson,* 24 Colo. App. 392-3, 133 Pac. 1052; *Foster v. Gray,* 24 Colo. App. 247-50, 136 Pac. 1046, and *Callahan v. Reinhardt,* 24 Colo. App. 199-200, 132 Pac. 387.

Any rights that might have accrued under this deed did not become vested in the plaintiff in error until December 27th, 1909, when, by sundry *mesne* conveyances, such rights were acquired by it, almost a year after this action had been commenced; and, therefore, the deed could not operate herein to the advantage of the plaintiff in error. The other tax deed pleaded in the answer was introduced in evidence by the defendant in error. It was issued to the plaintiff in error, recorded February 13th, 1901, and is also void upon its face in that it shows that the premises were sold to the County of Arapahoe and the certificate of purchase assigned by the clerk more than three years after the issuance thereof: *Callahan v. Reinhardt, supra.* This is the only tax deed pleaded by the plaintiff in error that could have availed it in this action as color of title, and, being void upon its face, it could not have prevailed against any laches of the defendant in error in the commencement of his action, nor set in operation the five-year statute of limitation: *Callahan v. Reinhardt, supra.*

The first payment of taxes under this deed that could have started the running of the seven-year statute of limitation was made April 17th, 1902, and between this date and the time of the commencement of the action, December 30th, 1908, seven years could not have expired to make the statute

effective: *Cristler v. Beardsley*, 25 Colo. App. 369, 138 Pac. 68.

Plaintiff in error objected to the introduction of a certain trustee's deed in evidence in support of defendant in error's title because it is said to have recited matters *in pais* of which there was no other proof offered. The objection was properly overruled, however, as it has been frequently held that the recitals in like trustees' deeds are *prima facie* proof of the matters therein stated: *Scott v. Lambert*, 24 Colo. App. 260-263, 132 Pac. 1145.

The result of the decree rendered by the trial court requires the defendant in error to return to the plaintiff in error the taxes paid by it, with a large rate of interest and heavy penalties, and leaves the fee simple title to the premises in the defendant in error, relieved of all blemishes or clouds by reason of the tax sales and attempted transfers of the property by the treasurer. The decree does substantial justice to both parties, and the broad and humane policy of the legislature, as construed by the courts, is carried out therein, and we should permit no mere technical objections raised by those showing no legal or equitable claim or estate in the fee simple title to defeat those laudable purposes of the legislature.

The decree of the trial court is hereby affirmed.

Affirmed.

[No. 3986.]

EMPIRE RANCH & CATTLE COMPANY v. BROWNSON ET AL.

1. TAX TITLES—*Void Deed.* A treasurer's deed which recites the sale of non-contiguous lands, *en masse*, for a gross sum, is void upon its face.

2. LIMITATIONS—*Void Deed—Effect.* The five years' statute (Rev. Stat. Sec. 5733) is not set in motion by a void deed.

3. —— *Color of Title and Payment of Taxes.* An action commenced within the seven years next succeeding the first payment of taxes is not barred by the statute. (Rev. Stat. Sec. 4090.)

Error to Washington District Court. HON. H. P. BURKE, Judge.

MR. R. H. GILMORE for plaintiff in error.

MR. WILLIAM H. WADLEY for defendants in error.

BELL, J.

This action was brought by the defendants in error in the District Court of Washington, County, Colorado, May 31st, 1910, under sec. 255, Mills' Ann. Code, to quiet their title to the S. E. ¼, sec. 18, tp. 2 N. R. 51 W. of the 6th P. M. The case was tried to the court without a jury, and a decree was entered quieting the title to the premises in the defendants in error upon their paying into the registry of the court for the use of the plaintiff in error the taxes, penalties and costs amounting to the sum of $77.00 expended by it. The defendants in error deraigned title to the premises through divers *mesne* conveyances to their father, John M. Brownson, from whom they inherited the same as his heirs-at-law. The plaintiff in error relied upon the five and seven-year statutes of limitation and, in support thereof, set up a county treasurer's tax deed, which shows a sale of the premises together with other non-contiguous property *en masse* for a gross sum, thereby rendering the deed void upon its face: *Johnson v. Gibson,* 24 Colo. App. 392-3, 133 Pac. 1052; *Foster v. Gray,* 24 Colo. App. 247-50, 133 Pac. 146; *Callahan v. Reinhardt,* 24 Colo App. 199-200, 132 Pac. 387; and, being void upon its face, it did not set in operation the five-year statute of limitation: *Callahan v. Reinhardt, supra.*

Plaintiff in error contends that it has held the premises in dispute under claim and color of title made in good faith and has paid all taxes assessed there against for seven successive years immediately prior to the commencement of the action. The tax deed relied upon as color of title was filed for record November 18th, 1902; the first payment of taxes after obtaining and recording said deed, which could have started the running of the seven-year statute, was made June 3rd, 1903; and the action was commenced May 31st, 1910,

some three days less than seven years from the date of said first payment. Less than seven years having expired between the date of such payment and the commencement of the action, the statute did not become effective or supersede the fee simple title of the defendants in error: *Cristler v. Beardsley*, 25 Colo. App. 360, 138 Pac. 68.

There are some technical questions of practice presented, but they are found not to be sufficiently serious to justify a reversal; hence, the decree of the trial court is hereby affirmed.

Affirmed.

[No. 4012.]

EMPIRE COAL COMPANY ET AL. V. ROSA.

1. MECHANIC'S LIENS—*Improvements by Lessee.* The lease of a coal mine, not providing for specific improvements by the lessee, does not authorize the imposition of a lien upon the interest of the lessor, for work done or improvements made by the lessee. (232)

2. ——*Mining Property—For What a Lien is Granted.* Work done in the extraction of coal, from a coal mine, does not give a lien. (233)

3. —— *Lienable and Non-Lienable Items Confused.* Where, though the evidence shows work done for the development, improvement or preservation of a mine, yet, if this is so confused with non-lienable items that the value thereof cannot be ascertained, no lien can be allowed. (234)

4. —— *Statute Construed.* The phrase "or other person" in Rev. Stat. sec. 4025 imports any person other than those named, *acting for the owner.* (235)

The provision of the statute (Rev. Stat. sec. 4025) requiring contracts for an amount exceeding $500.00 to be in writing refers only to contracts which provide for a contract price to be paid by the owner to the contractor. It has no application to the covenants of the lessee in an ordinary lease. (235)

5. —— *Pleading.* Where the party seeking enforcement of a lien relies upon the failure of the land owner to give the notice required by Rev. Stat. sec. 4020, his complaint must specifically allege facts which bring the case within the terms of that section. (235)

Error to Garfield District Court. HON. JOHN T. SHUMATE, Judge.

MESSRS. BARTELS, BLOOD & BANCROFT and MR. E. J. CHURCHILL, MR. J. W. BELL for plaintiffs in error.

MR. CLIFF G. ROWE and MR. C. W. DARROW for defendant in error.

KING, J., delivered the opinion of the court

This action was instituted by Peter Rosa, defendant in error, praying for personal judgment against both the plaintiffs in error, as defendants in the trial court, in the sum of $1,973.17, besides interest, and to establish and foreclose a mechanic's lien upon a half-section of land in Garfield County, Colorado, of which the defendant the Empire Coal Company was the owner. Judgment was rendered against the defendant, The Cardiff Coal Company, for the amount demanded in the complaint, which was declared to be a lien against the land and improvements of The Empire Coal Company, and foreclosure ordered.

The Empire company was the owner of the land described in the complaint, and of the coal mine thereon situated, known as the Diamond mine. The mine was leased by the owner to George R. Becker for a term to begin April 1, 1906. So far as disclosed by the record, the lessee was to operate the mine for the purpose of mining, selling, and disposing of the coal contained in said premises, upon condition that the lessee pay the lessor rental in the nature of royalty upon all coal mined by the lessee. This lease was assigned by Becker to The Cardiff Coal Company, which operated the mine until about May 1, 1911, at which time the mine and premises were sublet to D. W. Mansfield, who thereafter operated the same until about the first of November of the same year. For a long time prior to the subletting to Mansfield, he had been superintendent of the mine for the Cardiff company. Some time after the first of May, the plaintiff and eight other laborers, whose claims are included in the suit, were employed by Mansfield, and worked in the mine, and their claims were assigned to the plaintiff for collection. J. J. Smelcer had been employed by the Cardiff company as tipple boss, W. T. Mansfield (brother of the sub-tenant) as

coal miner, and William Fipps, agent of the Colorado Midland Railway Company, had been employed by the Cardiff Company—his services limited to the mailing of weights and billing of coal to the Leadville office. The last three named continued to work at the mine after May 1st, and their claims, together with a claim of the sub-tenant for wages or salary, were assigned to the plaintiff and included within the lien statement and the complaint.

1. The complaint alleged that the labor performed for which the lien was claimed was done in pursuance of a *contract* between the Cardiff company and the Empire company during the months of May to October, inclusive, "at the direct employment of defendant The Cardiff Coal Company, *contractor,* but, as plaintiff maintains, at the personal instance of the defendant The Empire Coal Company," and that the amount to be paid under the *contract* was in excess of $500, but that no copy of such contract was filed in the office of the recorder of the county in which the mine and the lands were situated. There was nothing in the evidence which supported the allegation of the complaint that the labor was performed under any *contract* between the Empire company and the Cardiff company, or the Empire company and Mansfield, or the Empire Company and the plaintiff or his assignors, nor that the Cardiff company was a *contractor,* within the contemplation of the provisions of the Mechanic's Lien Act. A lease in the usual form for the demise of real estate does not constitute a contract, nor create such a relation that the lessee becomes a contractor, under the provisions of said act. Such has been the uniform ruling in the courts of review of this state. *Wilkins v. Abell,* 26 Colo. 462, 58 Pac. 612; *Antlers' Park Regent M. Co. v. Cunningham,* 29 Colo. 284, 68 Pac. 226; *Williams v. Eldora-Enterprise G. M. Co.,* 35 Colo. 127, 83 Pac. 780; *Maher v. Shull,* 11 Colo. App. 322, 52 Pac. 1115; *Schweizer v. Mansfield,* 14 Colo. App. 236, 59 Pac. 843; *Little Valeria M. & M. Co. v. Ingersoll,* 14 Colo. App. 240, 59 Pac. 970; *Fisher v. McPhee & McGinnity Co.,*

24 Colo. App. 420, 135 Pac. 132; *Milwaukee G. M. Co. v. Tomkins-Cristy Hardware Co.*, No. 3976, *ante* 155, 141 Pac. 527, handed down by the court at the last term. While most of the foregoing decisions involve liens sought to be established on metalliferous mines, it is believed that there is no distinction in principle between such mines and a coal mine.

In *Fisher v. McPhee & McGinnity Co., supra,* we said:

"Unless so provided by the terms of the lease, the lessee is in no sense the agent or superintendent of the lessor, nor is he a contractor for the lessor, within the contemplation of the lien statute."

And the same rule was applied by us in *Milwaukee G. M. Co. v. Tomkins-Cristy Hardware Co., supra,* as to a lien claimed upon mining property for materials furnished to the lessee. The rule announced, in 1899, in *Wilkins v. Abell,* that a mechanic's lien will not attach to the interest of an owner of a mine for labor done in working or developing the mine, where the work is done at the instance of or under contract with one whose only interest is that of a lessee, has been consistently followed since that date, and there has been no modification in the lien act which in our opinion requires any departure from that rule, nor is there anything found in the circumstances or facts of the case at bar, as shown by the record, that affects that rule. There is nothing in the evidence which even suggests that the lease in this case created the relation of vendor and vendee as between the lessor and the lessee, nor that it was a lease providing for specific buildings or improvements, nor that its terms, construed together with section 4028 R. S. '08, relative to mining property subject to lien, in any manner or to any extent distinguishes this case from those cited. The work done, as shown by the evidence, was that usual, ordinary and necessary in the regular course of operating a coal mine, in extracting coal therefrom, although involving a small amount of "dead work," driving an entry (but whether in coal or not is not disclosed), and

laying some track. Besides, it nowhere appears what part of the labor sued for was performed in doing anything that might be termed development, preservtation or improvement of the mine, as distinguished from the mere extraction of the coal, and if some items are lienable, the amount cannot be ascertained from the evidence so as to form the basis of a decree.—*Antlers Park R. M. Co. v. Cunningham,* 29 Colo. 284, 288, 68 Pac. 226.

In *Williams v. Eldora-Enterprise G. M. Co., supra,* the court said:

"In the nature of things, a lease of a mine contemplates that the lessee must do at least ordinary development work. A mine is valuable principally if not wholly on account of the ore it contains, and to extract the same necessarily requires work to be done upon it. The work required here was merely ordinary development work, which brings the case within the holding of *Wilkins v. Abell, supra.*"

In *Henry v. Miller,* 145 Ill. App. 628, the court said:

"Labor performed in mining coal in the regular course of operating a mine is not performed in the making of any improvement within the meaning of the statute providing for mechanic's liens and therefore cannot be made the basis of mechanic's lien relief."

The rule there stated is the same in substance as that adopted by our own courts in the cases hereinbefore cited. See also Phillips on Mechanics' Liens, sections 58 and 65; *Hopkins v. Hudson,* 107 Ind. 191, 8 N. E. 91.

The contention made by counsel for defendant in error, that because of the words "or other person" contained in that provision of section 4025 R. S. '08 which says that "every contractor, architect, engineer, sub-contractor, builder, agent *or other person* having charge of the construction, alteration, addition to or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act," Mansfield must or may be considered the agent of the Empire com-

pany, cannot be sustained. The plain meaning of the provision quoted is that any one of the persons enumerated, or any other person *acting for the owner,* is to be held as the agent of the owner for the purposes of the act, and such we understand to be the distinct ruling in *Wilkins v. Abell, supra.*

2. The trial court made a finding, upon which it is fair to assume it based its decree, that the contract between the Empire company and the Cardiff company was in excess of $500. Such finding had no support in the evidence, and is based upon a perversion of the terms and meaning of the statute relative to such contracts as must be recorded in order to avoid a lien attaching as for work done at the personal instance of the owner. That provision of the statute has reference only to a contract for work to be done or materials furnished in which a "contract price" is to be paid by the owner to the contractor, and not to the contract contained in an ordinary lease in which all payments provided for are to be made by the lessee to the owner.

Counsel for defendant in error insist upon the application of section 5 of the act of 1899, 4029 R. S. '08, but there is no allegation in the complaint, and no evidence, to bring this case within the provisions of that section.

Under the issues made, the judgment as against The Cardiff Coal Company can be sustained only upon the theory that, because of its failure to give due notice of the change in its relations with Mansfield, and that he was no longer the superintendent, it still held Mansfield out to the public as its superintendent and agent; but The Cardiff Coal Company is not in this court complaining of the judgment.

For the reasons given, the judgment is reversed as to The Empire Coal Company, and the cause remanded with instructions to enter judgment in its favor.

Reversed and Remanded.

[No. 4032.]

MARSHALL v. BARRY.

1. CONTRACTS—*Construed.* Defendant held legal title to a mining claim, in which plaintiff's father was, in equity, entitled to a two-thirds interest. Defendant had employed plaintiff at the monthly wage of $20.00 to make certain improvements thereon, and keep it in condition to be exhibited to those who might come to inspect it with a view to purchase. Plaintiff testified that, subsequently, defendant wrote him that his full monthly wage would be $90.00 and asked if he, plaintiff, would not be satisfied with $20.00, look to his father for the balance; to which plaintiff responded that he would "look to whoever received the money when the property changed hands." *Held* that this correspondence had not the effect to establish, as against defendant, any addition to his previous obligations to plaintiff (238)

2. APPEALS—*Insufficient Evidence.* Where the evidence is manifestly insufficient to support the judgment it will be reversed. (241)

3. NEW TRIAL—*Newly Discovered Evidence.* The discovery, subsequent to the trial of a stated account in plaintiff's handwriting, showing the balance due him to be much smaller than his recovery. *Held* to entitle defendant to a new trial. (241)

Error to Denver District Court. HON. J. W. SHEAFOR, Judge.

MESSRS. DOUD & FOWLER for plaintiff in error.

MR. JOHN R. SMITH and MR. H. B. WOODS for defendant in error.

BELL, J.

J. L. Barry, defendant in error herein and plaintiff below, hereinafter called the plaintiff, brought this action in the District Court of the City and County of Denver against W. M. Marshall, plaintiff in error herein and defendant below, hereinafter called the defendant, to recover the sum of $280, with interest, alleged to be due him as wages for services rendered as engineer at the Kate mine in Boulder County, Colorado, during the months of November and December, 1901, and January and February, 1902. The case was tried to a jury and resulted in a verdict for the plaintiff upon which judgment was entered for the sum of $384 and costs.

During the time for which the claim in suit was made, and for some time previous thereto, the Kate mine stood of record in the name of Marshall, the defendant, he actually

owning but one-third interest in it, however, and the other two-thirds interest therein held in trust by him for Caleb W. Barry, the father of the plaintiff. For a time, the plaintiff worked the property, receiving in consideration for his services all the ore that he obtained therefrom, and thereafter he agreed to and did take care of the property—so as to have and keep it in a condition that its workings might be favorably inspected until such time as a purchaser might be secured—under other arrangements which, it was agreed upon the trial, were entirely expressed in correspondence that passed between him and the defendant herein. The first of this correspondence received in evidence was a letter from the plaintiff to the defendant, dated October 28th, 1901, and reads in part as follows:

"The parties who were here wanted to see the bottom of the shaft very much and I think they would have been pleased at what they found. Now, if you want the water out, I will take it out and keep it out until such a time as you do something with it or work it, providing you get all things needed and furnish me a man until I reach our pump, then I will do all there is to be done myself, you to have wood hauled in and I will cut it and you to give me $20 per month to live on and balance come when mine is sold or it will be made to pay. Now this is a fair offer I want to get it so the place can be shown to a possible buyer. I simply want enough money to buy provisions each month and I will be content to await a better time. I will make the house 12x14. I have all the timbers framed. I will need someone to help tomorrow put up frame. I will pay him out of the $5.00 you sent me. Let me hear from you soon if this meets your approval we ought to start before it storms if at all or the wood will be covered up."

To the above, the defendant replied, October 31st, 1901, in part as follows:

"In regard to taking out the water I have decided to go ahead with it if the cost is not too much. I understand you

to say that you will keep the water out for $20.00 a month until we make a deal of some kind. Will you then look to your father for additional wages or do you expect me to pay more. I understand from your letter that you will look to him when a sale is made.

"I suppose you ought to get up some wood at once and proceed with the small shaft house building. Do not spend much money on this for if we do business we will want a better one.

"I think you sent me a list of repairs but I can't find it. Let me have a full list of them again.

"What will you do about water bucket? Can you use the old one or will you try to borrow a pump? Let me hear from you at once."

The foregoing stated letters comprise the only correspondence between the parties in the matter of their contract received in evidence, and, if we are to consider them alone as the only evidence of the contract, then it is manifest that the plaintiff was to receive but $20 per month from the defendant for his services, until the property could be disposed of or made to pay, and look to his father, who owned two-thirds of the property, for any balance that might be due him. However, the plaintiff testified that on November 19th, 1901, he received another letter from the defendant, which was subsequently destroyed and, therefore, could not be placed in evidence, stating that the full monthly wages of the plaintiff would be $90, and asking if he would not be satisfied with $20 and look to his father for the balance; and to this letter, he, the plaintiff, replied that he would look to whoever received the money when the property changed hands. This correspondence is positively denied by the defendant; but, taking it for what it is worth, it does not establish any obligation upon the defendant other than is shown in his letter of October 31st. The plaintiff, prior to the date of this alleged correspondence, and immediately upon receipt of defendant's letter dated October 31st, entered upon his duties

under the terms stated in the last named letter, and received regularly for four months the sum of $20 from the defendant without any complaint or further demand. When the property was finally transferred to The Copper Ranch Mining and Milling Company, the plaintiff continued to work thereon, in the employ of the company, at agreed wages of $3.00 per day, one-half of which was to be paid to him in cash, and for the other half he was to accept stock in the company.

Caleb W. Barry testified in his son's behalf in part as follows:

"My son told me that Mr. Marshall had hired him to work on the Kate again. He later told me 'he couldn't stand the wages,' and finally I said to him, 'You go on through,' and asked him to stay with the property until we got it disposed of and got into money I will satisfy you. * * * My son told me the twenty dollars a month he was getting was so small he couldn't get along with it. I told him I wanted the property worked, to go ahead and when I got money from the property I would satisfy him. I own two-thirds of the property and Mr. Marshall one-third."

He also testified that he signed an order in words and figures as follows:

"Denver, Colo., April 29th, 1903.

"W. M. Marshall, Denver, Colo.

Pay to J. L. Barry $280.00 due him for labor on Kate mine in years 1901 and 1902 and charge to money due me for my interest in said property, of which you are trustee for my interest.

(Signed) C. W. BARRY."

Upon this order and the plaintiff's note the defendant loaned him the sum of $75.00, which, he testified, has never been repaid. The order was in the plaintiff's handwriting and, regarding it, the father testified that

"Later he (the plaintiff) comes to me with the order, which he said Mr. Marshall had dictated, or something, or

Mr. Marshall had written himself, and stated if I would sign it Mr. Marshall would give him so much money—$280 I believe, and he needed the money and I didn't care. When I got through I expected to give him money anyhow, whether he earned wages or not. I gave him this order. That is how it came exactly."

The defendant testified in his own behalf to the effect that the agreement between him and the plaintiff was for but $20 per month, as stated in the letters hereinbefore recited, and that no further correspondence or agreement in the matter was had between them, nor was any demand made upon him for any greater amount until about three weeks before the date of the order above set forth, over three years after the amount herein claimed is alleged to have been due.

The burden of proof was upon the plaintiff to establish the indebtedness by a preponderance of the evidence; and, from the matters herein recited, which is substantially all that was offered and received in evidence, we are of the opinion that no such preponderance exists.

It is evident that the plaintiff himself proposed the undertaking, which has resulted in this controversy, and was apparently interested in the care and development of the property through his father's interest therein. The fact that he entered upon the performance of the contract immediately upon receipt of the letter dated October 31st, and continued in the performance of his duties under the terms as therein stated for a period of at least 19 days before having any other alleged understanding in the matter, and the further fact that he received an order from his father for the full amount herein claimed for the identical services rendered, are strong circumstances in favor of the position taken by the defendant at the trial.

If this judgment were allowed to stand, the defendant would be obliged to suffer the entire cost of the care and development of the property during the time in controversy to the great advantage of the plaintiff and his father, notwith-

standing the fact that the defendant owned the smaller interest in the property, and his plain and positive statements to the plaintiff as to extent of his liability in the matter.

The condition of the record does not bring the case within the rule that, where the evidence is conflicting, the court of review will not disturb the verdict; but it is, rather, within the rule expressed in *Mitchell v. Reed, et al.,* 16 Colo. 109, 26 Pac. 342; *Denver, etc., Co. v. Roberts,* 6 Colo. 332-3; *London, etc., Co. v. Findlay,* 6 Colo. 571-3; *La Crosse, etc., Co. v. Scudder,* 4 Colo. 44, and numerous other authorities, that, where the verdict is manifestly against the weight of the evidence, it should and will be set aside.

We are unable to find any reasonable construction that can be placed upon the language of the letters received in evidence and the matters testified to which, under the circumstances of the case, could have justified the jury in rendering a verdict against the defendant.

If the trial court was satisfied with the sufficiency of the evidence, it should, at least, in the interest of justice, have granted the defendant a new trial upon the strength of the after-discovered evidence as set out, under proper allegations, in his amended motion. This after-discovered evidence was a statement of account between the plaintiff and defendant, in the plaintiff's own handwriting, showing a much smaller balance than the amount claimed in suit, and is in words and figures as follows:

"Check from W. M. Marshall..	$20.00
Check from W. M. Marshall...	5.00
Check from W. M. Marshall...	5.00
Check from W. E. Alexander..	20.00
Check from W. E. Alexander..	19.50
	$69.50

J. L. Barry to labor Nov. 1901	$20.00	Bal.	$70.00
J. L. Barry to labor Dec. 1901	20.00	Bal.	70.00
J. L. Barry to labor Jan. 1902	20.00)	stock to be given	
J. L. Barry to labor Feb. 1902	20.00)	for these months	
Money expended to Boulder to meet Mr. Alexander and machinery.	$ 5.00		$140
	$85.00		
Total received	$69.50		
Balance	$15.50"		

We are of the opinion, however, that, notwithstanding the weight of this statement, the evidence as presented at the trial is manifestly insufficient to support the verdict, and, therefore, the judgment rendered thereon is hereby reversed and the case remanded with instructions that it be dismissed.

Reversed and Remanded.

[No. 4038.]

GERMAN AMERICAN INDEMNITY COMPANY V. STATE MERCANTILE BANK.

1. EVIDENCE—*Admissions—By Conduct.* One for whom another, without authority, has assumed to act must not only disavow and repudiate what has been done, but must also give notice of such repudiation to those to be affected thereby, if he would avoid the inference of assent, which the court or jury are otherwise at liberty to indulge. (248)

2. CORPORATIONS—*Affected by Knowledge and Conduct of Officers and Directors.* The president and treasurer of a corporation borrowed of a bank, in the name of the corporation a sum of money which they applied to discharge a judgment against the corporation and the treasurer.

The bank having brought its action upon the promissory note of the corporation which was executed by the president and treasurer to evidence this loan, the corporation contended that the judgment had been recovered for an individual liability of the treasurer, and that it had been collusively permitted by the president and treasurer, in order to satisfy the individual liability of the treasurer, at the expense of the corporation. But it appeared that during the pendency of the action in which this judgment was recovered, at least seven out of the thirteen directors of the corporation, its president, secretary, executive committee, and general counsel, had knowledge thereof, and made no question as to the propriety of its position as defendant; that the judgment came to the knowledge

of the secretary, who was also a member of the board, and of the executive committee thereof, and was "generally known about the office of the company:" that at least one of the directors, and the secretary, who was also a director, knew of the loan, and the purpose to which the money was applied, and that no action was taken at the time to repudiate it. In view of these and other circumstances tending to show authority in the president and treasurer to borrow money in the name of the corporation it was *held* that the directors had, or should have had, full knownledge of the action of its officers in the premises, and that whether their conduct in permitting it to stand unquestioned was attributable to mere inattention, or to some other cause, the corporation was as fully bound towards those who acted without knowledge of any want of authority in the corporate officers as if the requisite power had been directly conferred. (245-248)

Error to Denver District Court. HON. JOHN H. DENISON, Judge.

MR. HORACE G. BENSON for plaintiff in error.

MESSRS. ZIMMERHACKEL & AVERY for defendant in error.

BELL, J.

This action grows out of a decree obtained in the District Court of the City and County of Denver jointly against S. N. Mitchell and The German American Indemnity Company, plaintiff in error herein, ordering and directing the above named, defendants in the action, to return to one L. K. Mulford, plaintiff therein, a certain two-thousand-dollar promissory note, together with a duly executed release of a certain trust deed securing said note; that they pay to him the sum of $50 as attorneys' fees, and the sum of $150 for services rendered by him to said company as auditor; and that he have judgment for his costs. By stipulation signed by counsel of record for the parties, the defendants agreed to waive their right of appeal and were granted a sixty-day stay of execution, at the expiration of which, E. C. Harrell, president and general manager of the company, and said S. N. Mitchell, its treasurer, negotiated a loan of $2,550 from The State Mercantile Bank, defendant in error herein, for the purpose of satisfying the decree, at the demand of the plain-

tiff therein, and gave as security for said loan a certain negotiable promissory note, dated April 19, 1912, signed by The German American Indemnity Company, by E. C. Harrell, Pres., and S. N. Mitchell, Treas., and by E. C. Harrell and S. N. Mitchell in their private capacities. Upon this note, the present action was instituted by the bank and resulted in a judgment in its favor in the sum of $3,008.97.

The defenses set up in the instant case by the defendant company, plaintiff in error, were that neither Harrell as president, nor Mitchell as treasurer, nor either of them in any capacity, had any power or authority to execute the note in suit or any instrument purporting to bind the company for the payment of money; that the note was the result of a conspiracy between them to defraud the company in the Mulford case by agreeing between themselves to permit an adverse judgment to be entered therein and to satisfy the same with the funds of the company, thereby discharging the personal debt of Mitchell to Mulford; that these facts were known to the plaintiff bank at the time the loan was made; and that the note in suit was made out of the due and regular course of business and was without consideration.

Certain by-laws of the defendant company and proceedings of its board of directors were offered and received in evidence to prove the powers, duties and authority of its officers, and they show that, upon the resignation of said Harrell as secretary and general manager of the company, November 24th, 1911, during the pendency of the Mulford case, a rising vote of thanks was tendered him by the board of directors of the company for his efficient services during the year previous, and he was immediately and unanimously elected president of the company to serve for the unexpired term; that, at the same time, the by-laws of the company were amended, to take effect immediately, and such amendments made it the duty of the president "to sign all deeds, bonds, certificates of stock, checks *and documents of any description of the company* and to have general supervision of all meet-

ings, either stockholders' or directors' meetings. * * * To secure the services and fix the remunerations of agents, employes, and assistant officers for the general promotion and welfare of the company (which latter duties were theretofore imposed upon the secretary and general manager) *and shall have entire charge of the affairs of the company.*" (The italics are mine.) The records and by-laws thus introduced further show that, by the amendment, the office of general manager was thereupon abolished, in so far as it was connected with the secretary, and that the same became merged in the office of the president; that the by-laws in conflict with said amendments were declared null and void as they previously read; and that the president, secretary and treasurer should constitute an executive committee to act in the absence of the board of directors and to have the same relation to the board that the vice-president does to the president. On January 9th, 1912, said Harrell and Mitchell were again elected president and treasurer of the company respectively.

The evidence developed the facts that Harrell and Mitchell had negotiated paper with the plaintiff bank at various times and on or about November 14th, 1911, had borrowed $1,000 on the company's note, which was paid by the company's check, February 6th, 1912, and payment thereof credited to the company; that The German American Trust Company also loaned the defendant company, August 19th, 1911, the sum of $1,000 on its note endorsed by said Harrell and Mitchell, which was paid October 30th, 1911; and that notes had been given to a bank in Trinidad. All of those transactions occurred previous to the date of the note in suit, but it seems that some of them, the loans at least, were never entered upon the books of the defendant company, although an entry was made therein showing a deduction of one thousand and fifteen or twenty dollars from the account of the company at The German American Trust Company Bank, without any explanation being given therefor, and the acts and conduct of the officers in the matters were never questioned by the

company. There were 13 directors of the company, a majority of whom, as we understand the record, resided or were frequently out of the city, and it seems that full charge of the entire affairs of the company was placed in the hands of said Harrell, its president and general manager. At the time of making the loan in suit, the plaintiff bank had been dealing with the defendant company for a period of from 18 to 24 months, and Harrell represented to it that, as the highest officer of the company, he had authority to sell paper, negotiate loans and transact the business of the company; and that the purpose of the loan was to take care of the Mulford judgment. Upon inspection and the strength of past transactions, in part at least, and the representations of Harrell, the loan was made, and the amount thereof, at Harrell's request, was placed to the credit of his personal account and fully checked out by him in the satisfaction of the Mulford judgment, which was thereupon fully satisfied of record.

Shortly before the Mulford suit was instituted, his attorneys sent a letter to the defendant company therein and copies thereof to Wm. M. Bowman, E. S. Shumway, E. C. Harrell and S. N. Mitchell, its officers and directors, stating that, if Mulford's claim was not settled promptly, suit would be entered against the company and Mr. Mitchell. The case was pending from April 11th, 1911, to December 5th, 1911, before trial, and, at the request of counsel of record for the defendants therein, Mr. F. F. Schreiber also appeared for the defendants at the trial and examined the pleadings. He was, at that time, a stockholder in the defendant company and subsequently, January 9th, 1912, was elected its general counsel and on May 20th, 1912, was elected president and general manager. The court held the case under advisement until February, 1912, when it made the decree hereinbefore referred to.

Dr. M. D. Brown was secretary of the defendant company from March, 1911, to May 20th, 1912, was a member of its board of directors and, together with Harrell and Mitchell,

constituted the executive committee, which, according to the by-laws, occupied the same postion to the board of directors as the vice president does to the president. He testified that he "was around the office of the company a good deal, (and) was more or less familiar with its affairs;" that "E. C. Harrell was secretary and general manager (of the company) exercising general supervision and control over its *finances and affairs;*" that he, the witness, knew of the Mulford judgment; and that said judgment was generally known of about the office of the company. It was further shown that he, Harrell, Mitchell, Schreiber, William A. Cook, W. N. Bowman and William Nolan, all directors of the defendant company during the pendency of the Mulford case, had knowledge thereof; and that the fees of the attorneys of record for the defendant company therein were paid by the company's check; but, notwithstanding all this knowledge on the part of at least seven of the directors of the company, its president, secretary, treasurer, executive committee and general counsel, the board of directors took no action in regard to the matter nor questioned the position of the company as a defendant in the case. Neither did it repudiate the act of Harrell and Mitchell in executing the note in suit, although it was shown that, beside those two, William A. Cook, a director, and Dr. Brown, secretary and a director, knew that the loan had been made to satisfy the Mulford judgment. Nor did anyone in behalf of the company repudiate the loan or the execution of the note, except Mr. Schreiber, who, on or about the 21st day of May, 1912, as the then president of the company, but without any direct authority from the board of directors in the matter, informed the plaintiff bank that he did not believe the officers of the company had any authority to execute a note of the kind in suit.

Therefore, from the foregoing recited facts, it is apparent that the directors of the defendant company had or should have had full knowledge of the acts in controversy, and, whether through inattention or otherwise they permitted them

to stand, they are as much bound to those who were not aware of any want of authority in the officers in the matter as if the requisite power had been directly conferred: *Beers v. Phoenix Glass Company,* 14 Barb. 358, 361. One for whom another has, without authority, assumed to act, must not only disavow and repudiate what has been done, but must also give notice of such repudiation to those to be affected thereby, if he would avoid the inference of assent, which the court or jury are otherwise at liberty to indulge: *Union G. M. Co. v. Rocky Mt. Nat. Bank,* 2 Colo. 565; *Breed v. First Nat. Bank,* 4 Colo. 481; *Breed v. First Nat. Bank,* 6 Colo. 235.

It cannot be successfully urged that the acts of Harrell and Mitchell were so concealed that the company or its directors had no knowledge thereof or were deceived thereby. The fact that Mitchell and the company were sued jointly was sufficient in itself to have put the directors on their guard and justify an inspection, which might have resulted in an exposure of any improper or unauthorized conduct on the part of its officers, Mitchell or Harrell; but, aside from this, the entry in the company's books showing an unexplained deduction of over a thousand dollars in its bank account at The German American Trust Company, the several payments by company checks hereinbefore mentioned, and the actual knowledge on the part of Directors Cook and Brown of the loan in question and its purpose, were likewise sufficient to put the board on inquiry if it had used ordinary care in looking after the interests of the company.

The acts under consideration having been performed by Harrell and Mitchell with knowledge thereof on the part of a number of the directors and employes of the company, and without any objection therefrom, it cannot and ought not to be heard to complain: *Union M. Co. v. Rocky Mt. Nat. Bk.,* 2 Colo. 248-257; *Union G. M. Co. v. Rocky Mt. Nat. Bk.,* 2 Colo. 565; *Oro, etc., Co. v. Kaiser,* 4 Colo. App. 219, 225, 226, 35 Pac. 677; *Lit. Pitts. M. Co. v. Little Chief M. Co.,* 11 Colo.

223, 17 Pac. 760, 7 Am. St. Rep. 226; *Beers v. Phoenix Glass Co.*, 14 Barb. (N. Y.) 358, 361; *Chestnut St. Trust & Savings Fund Co. v. Record Pub. Co.*, 227 Pa. 235, 75 Atl. 1066, 136 Am. St. Rep. 890; *Judell v. Goldfield Realty Co.*, 32 Nev. 351, 108 Pac. 455; *Houston Land & Loan Co. v. Danley*, (Tex. Civ. App.) 131 S. W. 1143; *La Normandie Hotel Co. v. Security Trust Co.*, 38 App. D. C. 187; *Talladega Ins. Co. v. Peacock, Adm'r*, 67 Ala. 253, 263; *Western Co. v. Bank*, 23 Colo. App. 143, 146, 148-151, 128 Pac. 476; *Whitaker v. Kilroy*, 70 Mich. 635-638, 38 N. W. 606; *Crowley v. Genessee M. Co.*, 55 Cal. 273, 276; *Spangler v. Butterfield*, 6 Colo. 356, 363; *Bank v. Chapman*, 122 Tenn. 415, 123 S. W. 641; *Atwater v. Am. Exchg. Nat. Bk.*, 152 Ill. 605, 619, 38 N. E. 1017; *McDonald et al. v. Chisholm*, 131 Ill. 273, 281, 23 N. E. 596; *Ford et al. v. Hill*, 92 Wis. 188, 197, 66 N. W. 115, 53 Am. St. Rep. 902.

The note was executed on behalf of the company in order to raise sufficient funds to satisfy a joint and several judgment then standing against it in favor of Mulford, and the moneys realized upon it were applied to this end; but it is claimed that the judgment was obtained in fraud and upon a claim owing personally by Mitchell and that, therefore, the note executed in satisfaction of said judgment was wrongfully executed by Harrell and Mitchell and was given without consideration. It has been shown, however, that part of the judgment was for a sum of money due as salary from the company to Mulford for services rendered as auditor and for $50 attorneys' fees alleged to have been agreed upon between the parties in that action. None of the evidence in the Mulford case is abstracted, and, therefore, it is impossible, and, in fact, it is unnecessary, for us to determine or inquire into the merits of the judgment rendered therein. The proceedings leading thereto were known to the officers and a number of the directors of the company; Mr. Schreiber, who later became its general counsel, examined the pleadings and was present at the trial; its secretary also had knowledge of the

proceedings and of the fact that judgment had been rendered therein; and, if the company had any proper defense to make to the action, it had sufficient opportunity to be heard, and, if it did not protect its rights therein either at the trial or later by an appeal, it should not now be permitted to profit by its negligence at the expense of innocent third parties.

A number of errors are assigned to the rulings of the trial court upon the evidence, all of which we have carefully considered but found none sufficiently serious to justify a reversal; and, therefore, under the condition of the record, the judgment is hereby affirmed.

Affirmed.

[No. 3508.]

THE TOWN OF FLETCHER V. CHILDS.

Per Curiam.

This is an action for recovery upon two municipal bonds of the denomination of one thousand dollars each, bearing date July 1, 1891, issued by the incorporated town of Fletcher, now the Town of Aurora.

The precise matters involved in this case have been decided by the Supreme Court in *Hayden v. Town of Aurora*, Colo. 142, Pac. 183, and the opinion in that case renders any discussion of this case unnecessary.

In conformity with the said decision of the Supreme Court, the judgment of the District Court from which this appeal was taken is affirmed.

Affirmed.

[No. 3641.]

THE TOWN OF AURORA V. HAYDEN.

Per Curiam.

In obedience to the mandate of the Supreme Court, the decision and judgment of this court rendered July 8, 1912, is vacated, and the judgment of the District Court is affirmed.

Affirmed.

MORRIS v. HOKOSONA.

[No. 3784.]

1. CONTRACT—*Performance.* Where the plaintiff counts upon an executory contract, alleging performance, he can recover only on proof of full performance, or that defendant accepted as performance, what was done. (252)

2. —— *Substantial Performance.* Where substantial performance of a contract is accepted, recovery may be had upon the contract for the amount stipulated, less such amount as will compensate for the failure to make strict performance. If there be not such substantial performance no recovery can be had upon the contract.

Deviations which are more than slight or trivial will defeat a recovery. (253)

3. —— *Instructions.* And the court should instruct the jury that substantial performance means an attempt in good faith to perform, strictly and fully, what the party has undertaken, and that only slight or inadvertent departures, not affecting the value of the structure, and which are capable of remedy, will be excused. (253, 254)

4. —— *Evidence—Burden of Proof.* The burden is upon the plaintiff to prove such substantial performance as will entitle him to recover and the amount necessary to compensate for his failure to strictly perform.

But the defendant may assume the burden of proving the amount necessary to make compensation. (254)

Appeal from Denver District Court. HON. GEO. W. ALLEN, Judge.

MESSRS. W. B. TEBBETTS, HERBERT M. MUNROE for appellant.

MR. GEO. S. REDD for appellee.

MORGAN, J.

Appeal by the defendant from a judgment on a verdict in favor of the plaintiff, in an action for an unpaid balance on a written contract for the construction of four dams, which the plaintiff alleges he completed in compliance with the contract, with the further allegation that the defendant accepted the work as it progressed; including a second cause of action for some extra work done under an oral agreement. Defendant claims that the dams were not constructed according to the contract, and the written specifications attached thereto, and that the dams leaked very much, and did not hold the

water because the contract was not complied with in reference to the excavations required to be made under the dams, and because of insufficient packing of the dirt, denying that he accepted the work as it progressed; claiming damages for failure to perform, and denying liability for the extra work. The judgment was for the unpaid balance of the entire contract price, and for the amount claimed for the extra work, done by the plaintiff in filling certain holes made in obtaining dirt with which to construct the dams.

Three distinct questions of fact were thus clearly presented by the pleadings, and contested at the trial; (a) was the contract fully performed, either by actual fulfillment or by acceptance *as such?* If so, then the plaintiff could recover the amount sued for on the contract. (b) If not so, then, was there such a substantial performance as would permit a recovery, *on the contract,* less such amount as would compensate the defendant for failure to strictly perform? If so, then, the plaintiff could recover the amount sued for on the contract, less the amount for such compensation, but if not so, then the plaintiff could not recover *on the contract.* (c). The issue as to the extra work. But the jury was instructed —(1), that it should find for the plaintiff for the balance of the entire contract price, if it found that he had *substantially* performed the contract; (2), if it found otherwise the verdict should be for the defendant; (3), if it found for the plaintiff it should also allow him such sum for the extra work as the parties had agreed upon. These instructions were incomplete and wholly insufficient to advise the jury in its deliberations.

It seems neither reasonable nor lawful that the plaintiff should be permitted to recover the entire contract price on a mere substantial performance, unless it were found, under proper instruction, that defendant accepted the work, and thereby waived a full performance; nor, that the plaintiff should recover for the extra work, unless it were found, under proper instruction, that the new contract was made as plaintiff claimed. Furthermore, in an action on an entire

building contract, claiming *full* performance and the *entire* contract price, the court should never instruct the jury, that the entire contract price may be recovered on a substantial performance, without a further instruction that, from the entire contract price, such amount must be deducted as will be sufficient to compensate the employer for the failure to fully perform the contract.

Anson on the Law of Contract (Huffcut's 2d Am. Ed.) 352, § 366; *Idaho Co. v. Colo. Co.*, 49 Colo. 66, 72, 111 Pac. 553; *Lombard v. Overland D. & R. Co.*, 41 Colo. 253, 92 Pac. 695; *Charles v. Hallack Lbr. Co.*, 22 Colo. 283, 43 Pac. 548; *Spence v. Hamm*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; *Nolan v. Whitney*, 88 N. Y. 648; *Pitcairn v. Philip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323; Bishop on Cont. (2d Enlarged Ed.), §§ 1421 1445; 2 Suth. on Dam. (2d Ed.), § 711; 6 Cyc. 87, 88.

Anson says:

"366. *Substantial performance at law.* The equitable doctrine of substantial performance has been adopted in common law actions in many states, and particularly in the adjustment of rights under building contract. If the contractor has acted in good faith and has substantially performed, he will be allowed to recover notwithstanding slight deviations from the contract, but his recovery will be diminished by the amount necessary to compensate for the deficiency. But deviations which are more than slight or trivial, or which are wilful, will defeat a recovery. This doctrine of substantial performance applies also to other contracts."

See also: *Phillips v. Gallant*, 62 N. Y. 256; *Woodward v. Fuller*, 80 N. Y. 312; *Hattin v. Chase*, 88 Me. 237, 33 Atl. 989; *Crouch v. Gutman*, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. 608; *Ashley v. Henahan*, 56 O. St. 559, 47 N. E. 573.

Furthermore, the court in such instances, should explain to the jury that substantial performance permitting a recovery on the contract means an attempt in good faith to strictly

and fully perform and is not satisfied unless there has been only slight or inadvertent omissions or departures which have not affected the value of the structure and which are capable of remedy and for which the employer may be compensated by a reduction of the contract price.

See foregoing authorities.

Such right to recover on the contract is fully explained in the authorities cited, and it is further disclosed that when the action is on the contract, claiming full performance, and a recovery is allowed on a substantial performance less such amount as would be required to compensate the defendant, the burden is upon the plaintiff to prove such substantial performance as will entitle him to so recover, and also establish the amount necessary to compensate the defendant for failure of performance.

Spence v. Ham, 163 N. Y. 220, 226, 57 N. E. 412, 51 L. R. A. 238.

In that case the court said:

"The contractor cannot recover the entire contract price when defects or omissions appear, for he must show not only that they were unsubstantial and unintentional, but also the amount needed to make them good, so that it can be deducted from the contract price and a recovery had for the balance only. This is an essential part of substantial performance, and hence the proof should be furnished by the one who claims substantial performance."

The same opinion is indicated in *Walling v. Warren,* 2 Colo. 434, 438.

It seems, however, there would be no reason why this burden as to compensation might not be shifted to the defendant, employer, if it be so assumed in the pleadings and on the trial. *Leeds v. Little,* 42 Minn. 414, 40 N. W. 309. *Niemeyer v. Woods,* 72 Ap. Div. 636, 76 N. Y. Supp. 563.

In the pending case the defendant pleaded what he calls a counter-claim for damages, which is in effect nothing more

than a statement of the defects in the dams and the particulars in which the contract was not complied with, and, hence a claim for recoupment, or compensation, as aforesaid, and, under the reasoning in the case of *Charles v. Hallack Lbr. Co.*, 22 Colo. 283, 291, 43 Pac. 548, this case comes within the theory above mentioned, whereby the defendant has assumed the burden of proving the amount necessary to compensate him for the non-performance.

The judgment must be reversed for lack of any instructions in a legal sense, and the foregoing exposition of the law is made in contemplation of another trial, and in the further contemplation that plaintiff may desire to recover on a substantial performance as distinguished from a strict performance, in case he fail to satisfy the jury that he has strictly performed, and that the work was accepted, as he alleged.

This case seems to have been tried on the theory of a strict and full performance, and if the parties try it again in the same way, the plaintiff could recover, only upon proof of full performance, or upon proof that the defendant accepted the work done *as a full performance.*

Lombard v. Overland D. & R. Co., supra; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Gillespie Tool Co. v. Wilson,* 123 Penn. 19, 16 Atl. 36.

The pleadings are sufficient, however, to permit a trial as heretofore indicated, followed by instructions on the issues as hereinbefore pointed out. The parties may amend, however, as they may be advised.

Now, as to the extra work; it seems a dispute arose at the time the plaintiff claims to have completed the work, in regard to the digging of some holes in a place not authorized by the defendant, the contract providing that the dirt with which to build the dams should be taken from places designated by the defendant. When this dispute arose, a new contract was entered into, settling the dispute as to the filling of the holes, by which new contract the defendant claims the

plaintiff agreed to fill the holes and repair dam number 1, which seems to have leaked more than the others, so that it would not leak, in consideration of defendant's paying for the labor required to fill up the holes; plaintiff claiming he was to be paid for filling the holes without reference to repairing the dam. Here was a direct issue that should have been submitted to the jury, not exactly as defendant requested, nor as the court submitted it; but, under the pleadings and the evidence, the issue should have been submitted to the jury, as a matter of law, that—if this new contract was made as plaintiff claims, that is, nothing was agreed as to repairing the dam, then the plaintiff should recover for the actual cost of the work in filling the holes according to the prices agreed upon; but, if the repairing of the dam was included, as defendant claims, then plaintiff could not recover anything for filling the holes until he repaired the dam so it would not leak, as the repairing of the dam would be a condition precedent to be performed before a recovery would be permitted for the extra work in filling the holes.

Reversed and remanded for further proceedings in accordance with this opinion.

BLOOM V. MCPHEE & MCGINNITY COMPANY.

[No. 3786.]

1. APPEAL AND ERROR—*Presumptions*, that conflicts in the testimony were resolved in favor of the successful party. (258)

2. PARTIES—*Nonjoinder of Defendant*, when not pleaded is no bar to an action against one of several liable as partners or associates. Rev. Code, sec. 61. (258)

3. STATUTE OF FRAUDS—*Debt of Another.* One member of an association orders goods for their joint account, directing the seller "to send the bill" to him, that he will see to its payment. The direction does not constitute a special promise to answer for the debt of another. Rev. Stat., sec. 3666. (259)

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. E. N. Burdick for appellant.

Messrs. Bartels, Blood & Bancroft and Mr. Raymond J. McPhee for appellee.

King, J., delivered the opinoin of the court.

Appellee brought its suit to recover from appellant the sum of $674.18, with interest, upon a complaint which alleged that between the 28th day of July and the second day of September, 1910, plaintiff sold and delivered to defendant certain goods, wares and merchandise of the reasonable value of, and for which the defendant promised to pay, the sum sued for. For his first defense, defendant denied each and every allegation of the complaint, except that plaintiff is a corporation; and for a further defense alleged that the goods, wares and merchandise for which the defendant was sued were sold to and purchased by Louis W. Buckley and J. F. Miller, *or* a certain committee of the Loyal Order ofMoose, and not to or by defendant, and that he did not, in writing, promise or agree to pay the indebtedness so created.

On the issues made, judgment was rendered for the plaintiff, from which defendant appealed.

The evidence tended to show, and was sufficient upon which to base a finding, that on or about the 25th day of July, 1910, the defendant and said Buckley and Miller entered into a written agreement to build, construct, equip, stage and promote a circus, thereafter called the Moose circus; that each should give his time, or a portion of his time, thereto; that defendant Bloom should furnish the funds or arrange for the credit necessary for the preliminary expenses of building and equipping the circus, and that the net profits to be derived from the circus should be equally divided among the three. Other agreements were made, which are not necessary to mention. On or before the 28th day of July, and apparently in pursuance of the agreement mentioned, the said Buckley presented or had presented to plaintiff orders for materials,

which plaintiff delivered; but before delivering or agreeing to deliver any thereof, plaintiff inquired of defendant as to who would be responsible for the goods, and was by him told that they were for the Moose circus, but to "send the bill to him, that he would see to the payment of the bill, and would guarantee its payment." All goods were delivered on the credit of said statement, with the exception of a small order which was made directly by defendant, with instructions to charge the same to J. C. Bloom & Company. In some respects the testimony is conflicting, and it will be presumed that the conflict was resolved in plaintiff's favor.

1. We think the oral testimony, taken together with the written agreement mentioned, establishes a partnership between the defendant and Buckley and Miller in the enterprise for which the merchandise was furnished by the plaintiff, and therefore a joint liability of the three for the indebtedness; but if there be any doubt as to the agreement's constituting a partnership, it cannot be doubted that the three promoters were jointly interested in the enterprise and in the profits, ordered the goods pursuant to the agreement to equip and carry on the circus, and that, as co-principals, they were jointly, if not jointly and severally, liable for the value of the goods. *Dumanoise v. Townsend,* 80 Mich. 302, 45 N. W. 179. It is contended by appellant that, under this proof, the judgment against the defendant individually cannot be sustained; and while we think that if plaintiff had knowledge of the relations between defendant and his associates at the time it brought the suit, it should have been brought against all of them, as partners or otherwise, nevertheless, we think appellant is not in a position to take advantage of the failure to so bring the suit, for by his failure to plead the non-joinder of his co-partners or co-principals, he waived that defect in the complaint.—*Mason v. Eldred,* 6 Wall. 231, 235, 18 L. Ed. 783; *Jones v. Langhorne,* 19 Colo. 206, 210, 134 Pac. 997; Section 55 Mills' Ann. Code, Section 61 Rev. Code 1908; 30 *Cyc.* 533.

In *Mason v. Eldred, supra,* it is said that a co-partner's liability to third persons is so far *several* that if he is sued alone on a co-partnership contract or liability, and does not plead the non-joinder of his co-partners, a recovery may be had against him for the whole amount due on the contract. And in *Jones v. Langhorne, supra,* our Supreme Court, after holding that in this jurisdiction all the partners must be joined as defendants in an action to enforce a partnership liability, states, with approval, the general rule that where a partner is sued individually for a firm debt, he must plead the misjoinder, in order that he may avail himself of this defense; and such we understand is the purport and effect of the provisions of section 55 Mills' Ann. Code, section 61 Rev. Code 1908, which provides that unless such objections as nonjoinder, etc., are taken by demurrer or answer, the defendant shall be deemed to have waived the same. Such objection cannot be successfully interposed at the trial or upon appeal, upon the ground of *variance.—Barry v. Foyles,* 26 U. S. 311, 317, 7 L. Ed. 157; *Waits v. McClure,* 73 Ky. 10 Bush 763, 765.

2. Appellant's contention that his individual promise to see that the bill was paid, or that he would guarantee its payment, as shown by the evidence, was within the statute of frauds, as "a special promise to answer for the debt, default or miscarriage of another person" cannot be sustained. Conceding that such promise on his part was a promise to pay the debt of a co-partnership of which he was a member, or of co-principals who were jointly liable with him, nevertheless, it does not constitute a special promise to answer for the debt of another person, within the provisions of the statute of frauds relied on.

"On the principle that the statute has no application where the undertaking is on the part of the promisor to pay his own debts, a parol promise by a partner to pay the debt of a firm of which he is a member is not within the statute."—Smith on the Law of Fraud and the Statute of Frauds, section 333; Brown on the Statute of Frauds, section 164; *Duma-*

noise v. Townsend, 80 Mich. 302, 45 N. W. 179; *Davis v. Dodge,* 30 Mich. 267; *McIntyer v. Houseman,* 98 Ill. App. 76; *Weatherly v. Hardman,* 68 Ga. 592; *Reid v. Wilson Bros.,* 109 Ga. 424, 34 S. E. 608; *Schindler v. Euell,* 45 How. Prac. (N. Y.) 33, 35; *Wilson v. Dozier,* 58 Ga. 602; *Douglas v. Jones,* 3 E. D. Smith (N. Y.) 551; 20 *Cyc.* 167, IV. B. And the same rule applies where two are co-principals, although a partnership does not exist.—Smith on Statute of Frauds, section 333; *Dumanoise v. Townsend, supra.*

Nothing can be plainer than that the enterprise of promoting, equipping and carrying on the Moose circus was a joint undertaking for the mutual benefit of Bloom and his two associates, and it is immaterial whether, technically, as between the three, appellant was a partner or not; he was jointly interested as a principal, and as such his promise to pay or guarantee the payment of the bill was a promise to pay his own debt.

The judgment is affirmed.

Affirmed.

ROCKY MOUNTAIN FUEL COMPANY V. GEORGE N. SPARLING COAL COMPANY.

[No. 3956.]

1. EQUITABLE ESTOPPEL—*When Applied.* The rule that as between persons equally innocent, a loss resulting from the frauds of another shall rest upon him by whose act or omission the fraud has been made possible only operates to protect those who, in dealing with others exercise ordinary care and prudence; and as against those who have voluntarily conferred upon the perpetrator of the fraud the usual *indicia* of title, so that they have apparent authority to dispose of the property. The owner of goods is not to be affected by a sale by one having the mere manual possession of the goods, or the muniments of title. The owner must be guilty of some act or omission of such nature as to mislead an innocent person as to the true position of the title. (265)

2. SALE OF CHATTELS—*Title Acquired.* The general rule is that the buyer takes only such title as the seller has, and is authorized to transfer. (266)

3. —— *Exceptions—Negotiable Paper—Bills of Lading.* To this rule negotiable paper is an exception.

So also the transfer and delivery to a *bona fide* purchaser of a bill of lading, endorsed and delivered by the consignor and original owner.

But bills of lading are not negotiable in the broad sense in which the word is applied to negotiable paper. To bar the claim of the defrauded vendor, in such case, it must appear, (1) That he parted with the possession of the goods, or the muniments of title, with intent to pass title to the wrongdoer. A felonious taking, or a taking against the owner's consent confers no title even upon a subsequent *bona fide* purchaser without notice. (2) That the purchaser acquired title from the wrong-doer, without notice of the defects in his title, or of circumstances which would have put a reasonably prudent person upon inquiry as to the source of the title. (3) The purchaser must have made advances or incurred liabilities on the faith of the title so presented to him. (266-268)

A previous loan of money, set off against the price of the goods, will not suffice. (268)

Stewart had for years been in plaintiff's employ as sales agent, and never engaged in business for his own account. This was known to defendant, who had often dealt with him in his representative capacity. Stewart represented to defendant that he was about to undertake business on his own account; that he had taken over the product of a new mine, and desired defendant's patronage, offering as an inducement, to set off against the price of the purchase ($75), an indebtedness for money previously loaned him by defendant. The defendant assenting to the proposition, Stewart, shortly thereafter, came to defendant, producing bills of lading for coal, showing upon their face that the coal was from an old mine, the product of which had long been upon the market, and that the coal had been diverted to defendant through the agency of plaintiff. Defendant purchased the coal, deducting from the price the indebtedness of Stewart, and making payment of the balance within $32.00. (262-264)

Held that in any view of the case defendant was liable to plaintiff for the $75.00, not paid on the bill of lading, and for the $32.00 not paid at all; and that defendant's knowledge of the position of Stewart as the agent of plaintiff, and that, as appeared by the bills of lading, the coal had been shipped to plaintiff, should have put defendant upon an inquiry, which, if pursued, would have disclosed that plaintiff was the real owner of the coal. (269, 270)

4. Principal and Agent—*Agent Acting for Self.* The principal is not responsible for the acts and representations of the agent while known to be acting for himself. (272)

5. Pleading—*Error not Occasioning Surprise or Injury,* will not be considered upon appeal. (272)

6. Appeal and Error—*Judgment.* All the facts being admitted an erroneous judgment for defendant was reversed and judgment entered for the plaintiff. (272, 273)

Error to Denver District Court. Hon. Greeley W. Whitford, Judge.

Mr. Edmund J. Churchill for plaintiff in error.

Mr. Clay B. Whitford, Mr. Henry E. May for defendant in error.

King, J., delivered the opinion of the court.

For convenience, the plaintiff in error will be called the Fuel Company, and the defendant in error the Sparling Company.

The controversy here under consideration concerns only the counter-claim made by the Fuel Company against the Sparling Company, which was resolved in favor of the latter upon trial before the court without a jury. There is no dispute as to the facts, which, so far as necessary to state, are substantially as follows: Both companies were dealers in coal, handling the same in carload lots, and both having offices in the city of Denver. George E. Sparling was president and manager of the Sparling Company, and acted for it in all transactions involved herein. H. E. Stewart was, and for some years prior to said transactions had been, the general sales agent of the Fuel Company. Sparling had been acquainted with Stewart for about nine years, knew his agency for and business relations with the Fuel Company, and had purchased a considerable quantity of coal in carload lots from said company, through the said Stewart as its agent. He had never, prior to this transaction, purchased coal from Stewart as owner, or known of his selling any as such. At different times prior to the 16th day of December, 1910, the Sparling Company had loaned money to Stewart, in sums at that time aggregating $75 unpaid. About ten o'clock of that day, Stewart went to the office of the Sparling Company, and stated to Sparling that he had taken the output of a new mine in the Walsenburg field, which he was going to handle for himself until the next spring, at which time he intended to quit the employment of the Fuel Company, solicited the Sparling Company to become his customer, and offered to sell it coal from said mine at the regular price to jobbers. Sparling agreed to take three cars, for which Stewart stated that he would bring over the bills of lading. About twelve o'clock of the same day, he brought one bill of lading for a car of coal, upon receipt of which bill of lading the Sparling Company gave him a check for $75, which, together with

Stewart's indebtedness of $75, paid for that car, with the exception of a small balance. Two other bills of lading were delivered—one about the 20th, and one about the 24th, of December. Two of the cars of coal were delivered to the Sparling Company for shipment to its customer at Brush, Colorado, and the two bills of lading in evidence were endorsed by the Sparling Company to such customer. All the cars of coal belonged to the Fuel Company, and were received and appropriated by the Sparling Company. The delivery of the coal and bills of lading to the Sparling Company by Stewart was accomplished in the following manner: The cars had been shipped by the Primrose Coal Company from its mine at Rugby, Colorado, to the Diamond Fuel Company, as consignee, at Denver, Colorado, and, together with the original bills of lading, came into the rightful possession of the Rocky Mountain Fuel Company. The bills of lading delivered by Stewart to the Sparling Company were what are known as substituted bills of lading, in which the name of the original consignee was changed so as to show a shipment direct from the Primrose Coal Company at Rugby to the Sparling Company at Denver or Brush. It was shown that substitutes are usually procured from the railroad company by the original consignee or its agent or endorsee by delivering the original bills of lading to the railroad company and securing a new bill of lading with the name of the consignee and the destination changed. This was shown to be a common custom of the railroad companies and shippers of coal, well known to both parties to this suit, and that it was customary for sales agents to procure such substitution for their principals. After Stewart made the foregoing contract with the Sparling company, he caused the substitution to be made by which the original bills of lading were surrendered to the railroad company, and substituted bills of lading issued. These showed on their face that the substitution had been made at the written request of the Rocky Mountain Fuel Company, as agent for or representative of the

Primrose Coal Company. Stewart, in person, took the bills of lading to the Sparling Company. There was nothing on or about the bills of lading which showed or indicated that Stewart was the owner thereof, and nothing, aside from his possession, to indicate that he had a right to deal in or dispose of the coal represented by the bills. The Primrose Coal Company was not a new company; its mine was not a new mine. It does not appear that Stewart made any further representations as to the ownership of the coal at the time he delivered the several bills of lading, or any other representation than as made to Sparling at the time he agreed to buy. When the Fuel Company discovered the delivery of the coal to the Sparling Company, it made a demand upon that company for payment, and was then notified that the Sparling Company had bought the cars from Stewart personally, and denied liability to the Fuel Company. Sparling testified that he believed Stewart's statement; that he did not look at the bills of lading except to see that his company was the consignee, and that when they were delivered by Stewart, "he being in the position that he was holding, it was evidence to me that the car belonged to him;" that he had no suspicion that the coal belonged to the Fuel Company. His position is indicated by the following questions and his answers thereto:

"Q. What induced you to make the payments to Stewart? A. The very fact that he came to me with the proposition of having this coal; that he brought the bill of lading to me was absolute evidence to me of possession of the goods.

Q. Did you rely upon that? A. Yes, I would do it every time."

1. Upon the undisputed facts and the finding of the court, the only substantial question for determination is one of law, *viz.*, whether the Fuel Company is estopped from collecting the value of its coal from the Sparling Company which received and appropriated it. It is manifest that the Sparling Company cannot resist the claim of the Fuel Company to payment for the merchandise, except by establishing an equit-

able estoppel founded upon the acts of the Fuel Company, and by the application of the rule that, as between two persons equally innocent, a loss resulting from the fraudulent acts of another shall rest upon him by whose act the fraud has been made possible. Such estoppel has been pleaded, and that it is relied on is evident from the following statement quoted from counsels' brief:

"In this case, The Rocky Mountain Fuel Company is, under the law above cited by us, estopped from collecting for this coal, because by its act in giving Stewart power to change the name of the consignee in the bill of lading, it has enabled Stewart to perpetrate the fraud."

The Fuel Company does not question the actual good faith or integrity of the Sparling Company, but contends that the bills of lading were received by it in such condition as, taken together with the other circumstances, were sufficient to put it upon inquiry as to the true owner, and therefore whatever loss befell was occasioned by the failure of the Sparling Company to make such inquiry as a prudent man should have made. The rule invoked as an estoppel, though general in its terms, only operates to protect those who, in dealing with others, exercise ordinary caution and prudence, and as against those who have voluntarily conferred upon others the usual evidences or *indicia* of ownership of property, so that they have apparent authority to dispose of it; but it is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession of the goods or the *indicia* and muniments of title.—Clark & Skyles, Agency, p. 1189. The owner must go farther, and do, or omit to do, some act of a nature such as to mislead persons as to the true possession of the title. The general rule of law is that a pur-

chaser of merchandise takes only such title as his seller has and is authorized to transfer; that he acquires precisely the interest, which the seller owns, and no other or greater. *"Nemo plus juris ad alium transferre potest quam ipse habet."* —*Broom, Max.* 452. "No one can transfer a better title than he himself possesses.—*Nemo dat qui non habet.*" If this rule be applied to the instant case—and it must be, unless the facts preclude its application—the purchase of the bills of lading from Stewart conferred no title upon the Sparling Company, or right to make payment therefor to Stewart in his private capacity. To this rule there are some exceptions, one of which applies to negotiable instruments only, upon the law-merchant, and reasons of public policy upon which that branch of the law rests; another is the transfer, by endorsement and delivery, of a bill of lading to *bona fide* purchasers for value, by a consignee to whom the consignor and original owner of the goods has endorsed and delivered it, thereby placing the apparent title and ownership in such endorsee, in which case the bill of lading is regarded as the symbol or representative of the property itself. But bills of lading are not negotiable in the same sense that bills of exchange are said to be negotiable, nor with the same effect, but are rather regarded as *quasi*-negotiable.—Porter, Bills of Lading, section 438.

"Bills of lading differ essentially from bills of exchange and other commercial and negotiable instruments. Bills of lading are regarded as so much merchandise."—*Shaw v. R. R. Co.*, 101 U. S. 557, 565, 25 L. Ed. 892. Wherefore, the rule that applies to bills of exchange, viz., that "suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion, in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title," is not the rule with regard to bills of lading.—*Shaw v. R. R. Co., supra.*

In the case last cited it was said:

"The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it. * * * At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill * * * is not a *bona fide* purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner."

And the law is that the endorsee of a bill of lading who had notice of such facts as to put him on inquiry as to the right of the vendor to dispose of the merchandise, which inquiry, if pursued, would have led to notice of the true state of the title, must abide the consequences if he choose to run the risk.—*Decan v. Shipper,* 35 Pa. St. 239, 78 Am. Dec. 334; *Dows v. Perrin,* 16 N. Y. 325;; *Bertoli v. Smith,* 69 Vt. 425, 38 Atl. 76; *Squires v. Barber,* 37 Vt. 558; *Barnard v. Campbell,* 55 N. Y. 456, 14 Am. Rep. 289; Id., 58 N. Y. 73, 17 Am. Rep. 208.

In *Barnard v. Campbell, supra,* is found a discussion of the law of estoppel (as applied to facts so nearly parallel to those at bar as to make it a precedent), so sound and satisfactory in reasoning that we are disposed to adopt the same, so far as applicable, for the disposition of this case. Jeffries, a broker, sold to Campbell and others certain linseed, in payment of which they made and forwarded to Jeffries their notes. At the time of the sale and the delivery of the notes, Jeffries was not in possession of the seed, nor of the bills of lading. Shortly thereafter, he purchased the seed of the plaintiffs, and by fraudulent representations induced them to deliver it to him, whereupon he shipped it to Campbell &

Co., and forwarded to them a bill of lading, but did not pay for the seed. Plaintiff sued Campbell for the seed; defendants claimed an estoppel under the application of the same rule contended for by the Sparling Company in this case. The court said that several things must concur to bar the claim of the defrauded vendor: (1) He must have parted with possession of his property, or the muniments of title, with intent to pass the title to the wrongdoer, thus giving him the apparent right of disposal. If it either has been taken feloniously or without the consent of the owner, the taker can make no title to it, even to an innocent purchaser for value. (2) The purchaser must have acquired title from the wrongdoer without notice of the defects in his title, or knowledge of circumstances to put him to an inquiry as to the source of the title. (3) Such purchaser must have parted with value upon the faith of the apparent title of the wrongdoer and his right to dispose of the property.

In applying the principles stated, the instant case is naturally divided into two parts—(a) the liability of the Sparling Company for that portion of the purchase price which it attempted to pay by offsetting its loan of $75 to Stewart, and $32.44 of the said purchase price which it admits it had not paid to Stewart. Those two items come clearly within the principle that, in order that a purchaser of goods obtained from the owner by the fraud of a third person can hold them or their value as against the owner, he must have advanced money or incurred liabilities upon faith in the apparent title of the wrongdoer and his right to dispose of the property, and then only to the extent of the advances so made or liabilities incurred. There is no pretense that the loan (a part of which was made eleven months, and a part one month, before the sale of the coal) was made, or the money advanced, upon the credit of the bills of lading or the possession thereof; and as to that amount, as well as to the amount of the purchase price still retained by the Sparling Company, there is no element of estoppel, and judgment therefor should have

been given for the Fuel Company, without regard to the question of estoppel as to the amount which the Sparling Company actually paid upon or after the delivery of the bills of lading. It was so held in *Barnard v. Campbell, supra,* as to the entire purchase price which was paid before the merchandise or bills of lading were delivered. (b) Its liability for that part which it paid after receipt of the bills of lading. The trial court based its judgment upon a finding that the Sparling Company did not doubt the representations made by Stewart, and its conclusion that there was nothing in the transaction which would have put a prudent man on inquiry—"nothing which would arrest the attention of an ordinary prudent business man." This latter conclusion was an inference which the court drew from the facts in evidence. We think such inference is not legitimately deducible from the evidence. Stewart was the employee of the Fuel Company, and for several years had been its sales agent, and as such charged with the sale of coal for his principal, and had not engaged in like business for himself, all of which was well known to the Sparling Company, which had dealt with him frequently in his representative capacity. Under these conditions, he approached the Sparling Company, a customer of his principal, not in his capacity as agent, nor making any representations as such, but in his own interest, and represented that he was about to enter into business as a competitor of his principal; that he had taken over the product of a *new* mine; that he wished to supplant his principal as a seller of the same commodity, and solicited the Sparling Company to purchase from him, offering as an inducement an offset of money which he owed it for loans made. Upon this statement, and it alone, the purchase was made. Within two or three hours, Stewart produced a certain bill of lading which showed that the coal which he was delivering was not from a new mine as he had stated, but from an old mine; did not show that Stewart was the consignee or its endorsee but did show on its face that it had been diverted to the Sparling

Company by or through the agency of the Fuel Company, Stewart's principal. This bill, disclosing Stewart's falsehood, and that his principal had secured the substituted bill, taken together with the knowledge of Sparling that Stewart was, and for a long time had been, sales agent of the Fuel Company, constituted *prima facie* evidence, and to our mind, very strong evidence, that Stewart come into possession of the said bills of lading in his capacity as agent, and that the bills belonged to his principal; they were not—as he testified and contends—evidence that they belonged to Stewart—because of the fact that Stewart was holding the position he occupied as agent of the Fuel Company. The several bills of lading upon which the Sparling Company relies furnished such proof that, taken together with other circumstances in evidence, they should have put Sparling upon inquiry, which, if pursued, would have disclosed that the Fuel Company was the real owner of the coal, and had not authorized Stewart to so dispose of it. Sparling testified that he did not read the bills of lading, or notice anything, except that his company was made the consignee. For such failure he cannot charge the Fuel Company. His ignorance of the contents of the bills of lading was the result of his failure to exercise the caution of an ordinarily prudent business man. We think Sparling had reason to believe that Stewart had no right to negotiate these bills for his personal use. "It may fairly be assumed that one who has reason to believe a fact exists, knows it exists."—*Shaw v. R. R. Co., supra,* p. 566. Perhaps faith (which is the "substance of things hoped for") in the statements of a debtor is readily induced, or increased, when the fruit thereof is the collection of a bad loan, and such faith, so induced, may sometimes dull the sharp edge of suspicion, and result in forgetfulness, or neglect of ordinary and reasonable business prudence—especially when coupled with a lie well told. In *Barnard v. Campbell, supra,* it is said:

"Public policy requires that purchasers of property should be vigilant and cautious, at least to the extent of see-

ing that their vendors have some, and the usual, evidences of title, and if they are content to rest upon their declarations, they may not impose the loss, which is the result of their own incautiousness or credulity, on another."

We have already called attention to a principle, that is applied with some strictness in a case of this kind, viz., that the purchaser must have parted with his money, relying upon the bill of lading. That it did so rely in the instant case is not shown by the evidence. In fact, we think it is clearly shown that the manager relied on the representations of Stewart, and that his unwarranted credulity, and not any act or failure of the Fuel Company, enabled Stewart to perpetrate the fraud. That the manager did not rely on the bills of lading as evidence of Stewart's ownership of them or of the coal, is shown by the facts—(a) that there was nothing in or on the bill that indicated that Stewart had any interest in it or right to dispose of it; (b) there was that on the bill which would, if noticed, have excited his suspicion; (c) that he did not read or otherwise examine the bill, except to notice that his company was consignee. It is a waste of energy to insist that Sparling, as a prudent business man, expended substantial sums of money in reliance on a bill of lading in which he was not sufficiently interested to ascertain therefrom the name of the consignor, the place from which shipped, by whom the request for substitution was signed, or by whom the bill was endorsed, when he knew that he was not the original consignee, and when it also is shown that if he had examined it, the entire absence of any showing of right in Stewart to dispose of the coal would have appeared. Bare possession of the bills of lading by Stewart, not in his name, did not clothe him with power to dispose of them as though he were owner, and to the preclusion of the right of the real owner. He was not thereby clothed with the apparent ownership.—Clark & Skyles, Agency, section 236. There is no reason or equity in placing the burden of a fraudulent sale upon a *bona fide* owner rather than upon a *bona fide* pur-

chaser from a fraudulent vendor, unless the purchaser has parted with his money, relying upon some act or omission of the owner, by reason of which he has induced the purchaser to treat with a fraudulent vendor as owner.

Counsel for plaintiff in error argues certain exceptions which are based on objections to the reasons given by the trial court for its judgment. These objections and the argument thereon have been considered, but will not be discussed. It is often held that a court of review is not concerned in the process of reasoning by which a trial court arrived at a correct conclusion or judgment, but we have not heard it said, and think it not true, that a court of review is not concerned in the reasoning by which the trial court reached a conclusion upon which a judgment is based which apparently ought not to be sustained. The path into a jungle may serve to point the way out. From the remarks of the trial court in announcing its conclusion, it is fair to assume that it overlooked, or failed to give effect to, the familiar principle that an agent of a corporation while *known to be acting for himself* cannot be regarded as such agent, nor his principal made responsible for his acts or representations.

2. It is contended that the Fuel Company cannot recover on its counter claim, because it declares *in assumpsit,* whereas, the proof is of a *conversion.* Technically, this objection may be well taken, but it is a mere technicality. The Sparling Company, by one answer to the counter-claim—a plea in confession and avoidance—stated the conditions under which it took the coal, which showed a conversion, and which it sought to avoid by pleading estoppel. The case was tried upon that theory. There was no surprise. We think it may well be held that if the Fuel Company ought to have added a count in conversion to its counter-claim, that defect in pleading is cured, or should be disregarded. — Section 78, Mills' Code. It is manifest that no good would be accomplished by returning the case to the trial court, with leave to amend so as to plead conversion.

For the reason given, the judgment on the counter-claim is reversed, and the cause remanded with instructions to enter judgment thereon for the Fuel Company.

Reversed and Remanded.

EVERIST, ET AL. v. DRAKE.

[No. 3964.]

1. FRAUD—*Evidence.* A charge of fraud must be supported by positive, clear and convincing evidence. (275)

2. —— *False Representations to which Defendant was not a Party.* Everist negotiating with Drake for the change of the lands of Drake for certain promissory notes of one Matzik, made certain representations as to the value of these notes. *Held,* that others, who, at a later date, in association with Everist, induced Drake to part wih the Matzik notes, were not chargeable for the representations made by Everist on the first occasion. (283)

3. —— *Expressions of Opinion as to Value.* Parties dealing at arm's length about a proposed exchange of promissory notes are not chargeable with fraud for mere expressions of opinion as to the value of the notes. To sustain the charge in such case it must appear, in addition to the exaggerated statement of value, that the party complaining, though using reasonable prudence and caution, was fraudulently tricked into reliance upon such false statements. (277-280)

One who purchases promissory notes secured by mortgage of lands, without examination of the lands, having opportunity to do so, and not being induced to omit such examination by any trick of the vendor, cannot rely upon exaggerated statements made by the vendor to support a charge of fraud. (278)

The evidence examined and held insufficient to sustain plaintiff's action. (276, 277)

4. DAMAGES—*Elements.* Action for fraud in inducing plaintiff to accept promissory notes of one H., for promissory notes of one M. The damages are measured by the difference in value between the two sets of notes. (283)

Error to Rio Grande District Court. HON. CHARLES C. HOLBROOK, Judge.

MR. JAMES P. VEERKAMP for plaintiffs in error.

MR. JESSE STEPHENSON for defendant in error.

HURLBUT, J., rendered the opinion of the court.

Suit brought October 9, 1911. Plaintiff (defendant in error) by his verified complaint alleges in brief that in June, 1910, he bought from defendants eighty acres of land in Rio Grande county, Colorado, (herein designated as the Jemison land); that thereafter plaintiff contracted to sell this land to defendants in consideration of certain promissory notes given by one Matzick, which were secured by mortgages on on land in Furnace county, Nebraska; that defendants failed to perform their part of the contract, but offered in lieu thereof to pay plaintiff for his said land with notes executed and delivered by William H. and Cora B. Hartman, aggregating the sum of $8,700, which notes were secured by a second mortgage upon one hundred and sixty acres of land in Conejos county, Colorado, and which they represented to be much more valuable as security than the Matzick notes and mortgage; that plaintiff accepted the same and subsequently paid defendants an additional sum of $1,000; that, at the time plaintiff sold the Jemison land, and accepted the Hartman notes in consideration therefor, there was a prior mortgage indebtedness existing against the Hartman land for the sum of $3,635, which was to be paid by plaintiff out of the proceeds of the Hartman notes. It is then alleged that for the purpose of inducing plaintiff to accept the Hartman notes and mortgage, defendants falsely and fraudulently represented to plaintiff that they were of greater value, and were better security than the Matzick notes and mortgage; that each of said statements were false and untrue, and known by defendants to be so, and were made by them for the purpose of defrauding plaintiff out of the Matzick notes and mortgage; that plaintiff believed such statements to be true, and acted under such belief; that by means of such false and fraudulent representations defendants induced plaintiff to release them from the Matzick contract. It is also alleged that, as an additional reason for inducing plaintiff to cancel the Matzick contract, defendants fraudulently stated that Hartman had made great preparations for the payment of his notes, by farming,

in addition to his own, some other land, rented to him by defendants; that such statement was false and made for the sole purpose of defrauding plaintiff; that all the statements made by defendants as to the relative values of the Hartman and Matzick notes, mortgages and lands, were false, and fraudulently made, and if the same had not been made plaintiff would not have canceled the Matzick contract and accepted the Hartman notes.

The case was tried to the court without a jury, and judgment rendered for plaintiff in the sum of $5,523.

Under the pleadings and record as made, this action must be regarded as one based upon fraud and deceit, and recovery, if had, must be supported by positive, clear and convincing evidence. The entire negotiations between plaintiff and defendants involved three separate and distinct transactions: *First,* the transaction involving the Jemison land, which was purchased by plaintiff, and for which he received a deed. The record is clear that in this matter no fraud was proven against defendants or any thereof, and no such claim is now made. The plaintiff himself testified as follows:

"Q. You do not claim that they (defendants) represented any fraud to you in the sale of this Jemison land? A. Nothing, only they had the price pretty tolerably high.

* * * * * * * *

Q. So you paid them the money and you got good value at that time for this money, didn't you? A. Yes, sir."

It will therefore not be necessary to further allude to this transaction, unless incidentally. *Second,* the transaction concerning the Matzick notes and mortgage. It was founded upon a written contract executed by plaintiff and the defendant William F. Everist, January 23, 1911. It is conceded that this contract was abandoned by mutual consent of the signers. The record fails to disclose any evidence of fraud or deceit, against defendants or any thereof, in this deal, and it need not be further noticed. The *third* and last transaction involves the sale of plaintiff's interest in the Jem-

ison land for the Hartman notes, aggregating $8,700. The fraud charged is based on this exchange, and is the controlling issue. Its determination is decisive of this appeal. We have searched the record with care to obtain a knowledge of all material evidence that tends to support this issue on behalf of plaintiff.

Plaintiff's position is that his evidence clearly establishes the fraudulent representations and actions of defendants, as pleaded. We will discuss the alleged frauds charged against the defendants in the order pleaded in the complaint. Defendants, in their pleadings and at the trial, vigorously denied having made the false representations charged in the complaint concerning the relative values of the Matzick and Hartman notes; but, assuming them to be true, as the trial judge must necessarily have done, are they sufficient in law to sustain an action for fraud and deceit? There is nothing in the record tending to show that plaintiff was tricked into buying the Hartman notes. It appears from his own testimony that he was willing to, and did, abandon the Matzick contract and exchange his interest in the Jemison land for the Hartman notes. The evidence discloses that he knew he would be unable to pay the Jemison mortgages, which were approaching maturity, and he was willing to escape total loss of his Jemison land, by exchanging that interest for some other real property with a more favorable status. It is not therefore to be wondered at that he accepted the Matzick proposition immediately upon its presentation to him, and entered into that contract. Before that contract was consummated, however, the defendant Everist discovered that he was unable to secure the Matzick notes for plaintiff, and promptly informed him of that fact, at the same time suggesting that defendants had other notes or securities that they would be willing to substitute for the Matzick notes, if satisfactory to plaintiff, whereupon plaintiff at once expressed his willingness to act on the suggestion. He did so, and soon thereafter abandoned the Matzick contract and closed the Hartman deal. Taking the

most favorable view of all the evidence on behalf of plaintiff, defendants' statements, as to the relative values of the two sets of notes and mortgages (Matzick and Hartman), appear to be mostly "trade talk" and exaggeration of the value of one set of notes and securities over the other. At most they were but expressions of opinion at the time of the deal. These parties were dealing at arms' length. Both the Matzick and Hartman lands were covered by second mortgages which secured the notes offered to plaintiff. The Matzick land was located in Nebraska and the Hartman land in Colorado. There is no clear showing by the record that the Matzick notes and mortgage were more valuable as an investment than those of the Hartmans. Plaintiff agreed to sell to defendant Everist his interest in the Jemison land for certain notes signed by Matzick, apparently aggregating $5,500. The record does not disclose the amount of the first mortgage on the Matzick land, so that, the Matzick notes being secured by a second mortgage, and there being no evidence of the amount of the first, which was a paramount lien, we do not see how the court can reasonably say these second mortgage notes were of greater value than the Hartman second mortgage notes. The evidence shows that the first Hartman mortgage was $3,635. Be that as it may, we do not think that under this record any statements made by defendants to plaintiff, concerning the value of the notes in question, would sustain an action for fraud and deceit. To sustain such an action there must be, in addition to an exaggerated statement of value of property by the seller, some circumstance attending the same that shows the purchaser, in the exercise of reasonable prudence and caution, was overreached, or fraudulently tricked into relying thereon, to his damage. We discover no such situation here.

The rule as to statements of value, made by a seller to a purchaser is, in *Baum, et al. v. Holton, et al.*, 4 Colo. App. 406, 36 Pac. 154, expressed as follows:

"It is no doubt true that as between seller and buyer, statements of value by the former ought not to be taken as trustworthy by the latter, and that the law will not help a purchaser who accepts exaggerated or false statements of value made by a vendor; but this rule does not hold good where a confidential relation exists between the parties; or where one of the parties professes to have special knowledge of the value of the property, and of which the other, being ignorant, to the knowledge of the former, trusts to his good faith."

Applying the rule to the facts before us it does not appear from the record that any artifice was practiced by defendants upon plaintiff to induce him to purchase the Hartman notes in lieu of the Matzick notes; nor does it appear that any effort was made by defendants to induce plaintiff to forego an examination of the Hartman land. It was located about eighteen or twenty miles from where plaintiff lived, and, he being a farmer and the premises being agricultural land, common prudence would suggest an inspection of the same on his part before surrendering his Jemison land for the Hartman notes which were secured only by a second mortgage. This seems to have been his usual custom, for he testified that he never bought land unless he first saw it. Plaintiff contends that he was tricked into not examining the Hartman land, in the following manner: He claims that defendants waited until he was busily engaged in harvesting his crops and then defendant Vastine came to his house in an automobile and importuned him to settle the matter up at once, as he intended to leave for Nebraska that evening; and that he thereupon went to town with Vastine, and closed the deal for the Hartman notes. When plaintiff was asked why he did not first go and examine the land he answered because he believed defendants' statement that the Hartman notes were more valuable than those of Matzick, that he was busy with his crops, and took their word for it. He stated, however, that neither Vastine nor Everist did anything to prevent him from looking at the land,

and that Vastine simply stated he wanted to fix the deal up that evening so he could go away. We discover nothing of a fraudulent nature in this transaction, as it is not shown that Vastine did not leave for Nebraska that evening as he stated he intended to do. It is worthy of observation that the record fails to show plaintiff to have expressed at any time a desire or intention to personally inspect the Hartman land before making the exchange. The evidence shows that the greater part of the statements of value, made by defendants, were directed toward the relative value, as security, of the two sets of notes and mortgages, the Matzick and Hartman. It is undisputed that as soon as Everist told plaintiff he was unable to obtain the Matzick notes and mortgage, according to previous understanding, he offered to "turn back his (Drake's) money and land," "just like you had it," at the same time stating to him that defendants had some other notes in the bank they were willing to trade him if satisfactory. Plaintiff declined, however, to receive back his land (Jemison tract), or the money. The undisputed fact, that the Hartman notes of $8,700 delivered to plaintiff were indorsed by defendants without recourse, is of no great importance, as such indorsement was thoroughly explained to plaintiff before he took the notes. Plaintiff admits this to be true. If all the evidence be considered together, even in the most favorable light for plaintiff, we are not convinced that it establishes a case of fraud, against defendants, within the recognized rule herein referred to.

In *Andrus v. St. Louis S. & H. Co.*, 130 U. S. 643, 32 L. Ed. 1054, 9 Sup. Ct. 645, the court had under consideration an action based on fraud and deceit in the sale and purchase of a lot in Leadville, Colorado. Plaintiff there contended that defendant made fraudulent representations to him concerning the title and possession of the lot in question. Justice Field, speaking for the court, said:

"The law does not afford relief to one who suffers by not using the ordinary means of information, whether his

neglect be attributable to indifference or credulity; nor will industrious activity in other directions, to the neglect of such means, be of any avail."

In *Parker v. Moulton,* 14 Mass. 99, 19 Am. Rep. 315, the court said:

"The affirmations here set forth as between buyer and seller, it has been repeatedly decided, will not support an action, although the defendant knew them to be false when made. They concern the value of the land or its condition and adaptation to particular uses, which are only matters of opinion and estimate, as to which men may differ. To such representations the maxim *caveat emptor* applies. The buyer is not excused from an examination unless he be fraudulently induced to forbear inquiries which he would otherwise have made."

In *Ellis v. Andrews,* 56 N. Y. 83, 15 Am. Rep. 379, the court said:

"Upon the question of value the purchaser must rely upon his own judgment; and it is his folly to rely upon the representations of the vendor in that respect. * * * In *Van Epps v. Harrison* (5 Hill 65), it is stated as undoubted law that an action will not lie by a purchaser against a vendor upon false and fraudulent statements of the value of the property sold, made while negotiating the sale. This was concurred in by the entire court."

Kimber v. Young, 137 Fed. 744, 70 C. C. A. 178 (Colorado case) is well reasoned, and discusses the same question now under consideration. The court says:

"Positive statements as to value are generally mere expressions of opinion and as such cannot support an action of deceit."

The court further says, quoting from *Kimball v. Bangs,* 144 Mass. 321, 11 N. E. 113:

"The law recognizes the fact that men intentionally overstate the value and qualities of the articles which they

have to sell. All men know this and a buyer has no right to rely upon such statement."

Numerous other cases could be cited in line with the foregoing authorities, but we need not extend the list.

Plaintiff also contends that defendants made false and fraudulent statements to him concerning the efforts being made by Hartman, in the way of extensive farming, to obtain money to meet the payments upon his notes at their maturity. He states that defendants told him Hartman was honest, and should meet his payments with the big crops he was putting in; that he was also farming some land he had rented from them; that he was putting in 200 acres of oats, 30 acres of potatoes, and some other products; and that he would meet the notes "as fast as they became due, without doubt." It appears that some time (date not given) after plaintiff accepted the Hartman notes, he visited the land and found thirty or thirty-five acres of potatoes planted, as represented, but ascertained that only five acres of oats, instead of two hundred acres, were planted. Admitting that only five or six acres of oats were planted, instead of two hundred, it is hardly reasonable to presume that plaintiff would be entirely influenced to convey his interest in the Jemison land, upon which he had paid $5,500 in cash, for second mortgage notes aggregating $8,700, on other property, upon the mere belief that Hartman was engaged in planting two hundred acres in oats; besides, there is no showing as to the probable value of that quantity of oats for that season. It is not claimed, however, that Everist told plaintiff two hundred acres of oats, etc., had already been planted by Hartman. He stated that Hartman was *putting in* the same. The record shows this conversation to have taken place in March. From this a fair presumption arises that the greater part (if not all) of the two hundred acres of oats, etc., was to be planted by Hartman subsequent to the date of the conversation. This fact is important, as the law seems to be well settled that an action for fraud and deceit cannot be successfully predicated upon false

representations concerning events to occur in the future. In order to sustain such an action the representations must relate to something that is existing at the time or has taken place in the past.

It may be conceded that the record shows, on the part of both defendants, Everist and Vastine, a rather earnest anxiety to trade the Hartman notes to plaintiff for his equity in the Jemison land, and the by-talk and exaggeration indulged in by them, as to the relative values of the Matzick and Hartman notes, were not permissible under the best rules of fair dealing. But, unless the same directly induced plaintiff to forego a personal examination of the lands covered by the Hartman mortgages, or to forbear inquiry which he would otherwise have made, an action for fraud and deceit could not be predicated thereon. We do not think plaintiff in this case was so influenced. It is worthy of notice that at all times during the entire negotiations plaintiff acted for and on behalf of himself, without the intervention of any third party as counsellor or otherwise. He was a man of mature years, a farmer, and dealing entirely in agricultural land, concerning which he is supposed to have possessed ample knowledge. In all probability he felt capable and competent to protect himself in any of the transactions had with defendants. If, in such dealings, he was lacking in common prudence and caution, the law cannot relieve him from the results following the unfortunate bad judgment exercised by him in his contractual relations with the defendants, in the absence of a clear showing that the exercise of such judgment was the direct result of palpable fraud or trickery practiced upon him by defendants. From the amounts of the mortgages and values placed upon the lands herein involved it would appear that such lands carried decidedly inflated values, but plaintiff will be presumed to have given this matter some consideration before investing his money in the first instance.

In addition to our views as hereinbefore expressed, there is another reason why the judgment of the trial court must be

reversed. The action, as we have already said, was one based on fraud and deceit, and the judgment sounds in damages only. It is certain that the trial judge, in arriving at the damages to be awarded, adopted as the measure thereof the amount paid out by Drake as the purchase price of lands which he bought and paid for before the alleged fraudulent representations, upon which suit is brought, were made. Neither the value of the Hartman notes nor the value of the Matzick notes was considered in determining the *quantum* of damages, and the judgment cannot be sustained, because there is no competent evidence upon which, under this complaint, such judgment could be predicated. If it be urged that representations were made by Everist, at the time of the negotiations between himself and Drake, looking to the exchange of the latter's equity in the Jemison land for the Matzick notes, to the effect that the Matzick notes were good, then, inasmuch as that transaction was entirely between Everist and Drake, neither Vastine nor the investment company can be held in this action for the representations of Everist, made at that time.

We have given consideration to the demurrer filed by defendants, challenging the complaint on the ground that no cause of action is stated, and while there may be some question as to its sufficiency, we prefer to decide the case on its merits. Upon consideration of the entire case we are convinced that the evidence is insufficient to warrant the judgment rendered. It is therefore reversed and remanded for new trial, with instructions to the District Court to permit the respective parties to amend their pleadings as advised.

COUNCIL v. UNITED STATES INVESTMENT COMPANY.

[No. 4008.]

PRINCIPAL AND AGENT—*Plaintiff's Repudiation of the Acts of His Agent* must be entire. He may not, knowing all the facts, approve and accept the acts of the agent, and then repudiate them in part, to the injury of third persons. (285)

Defendant authorized Smith to sell a tract of land at $92.50 per acre, retaining the $2.50 as his commission. Smith solicited the assistance of plaintiff, and thereby found a purchaser at $100 per acre, it being agreed that plaintiff should receive a commission of $7.50. Defendant, knowing all the facts, assented to the transaction, without objection or protest, executed a conveyance to the client of plaintiff, and received the purchase money, but refused to pay plaintiff any part thereof, alleging that he had never employed them, nor was in any way obligated to them. Judgment for plaintiff affirmed.

Error to Rio Grande District Court. HON. CHARLES C. HOLBROOK, Judge.

MR. JESSE STEPHENSON for plaintiff in error.

MR. JAMES P. VEERKAMP for defendant in error.

CUNNINGHAM, Presiding Judge.

This was an action brought by the defendant in error to recover a commission which it claimed on account of having sold a tract of land belonging to the plaintiff in error. There was, on the trial, practically no conflict in the evidence, and so far as there was a conflict, the same was resolved in favor of the defendant in error. Stripped of all immaterial features, the record shows that plaintiff in error listed certain lands which he owned in Rio Grande county, with a real estate agent by the name of Smith, after which he, plaintiff in error, removed to California. Under plaintiff in error's arrangement with Smith, the land was to be sold by the latter for $92.50 an acre, $2.50 an acre to be retained by Smith as his commission. Smith, without the authority of plaintiff in error, entered into an arrangement with the Investment Company whereby if the Investment Company found a purchaser for the land, it should pay to Council $90 per acre net, to Smith $2.50 per acre, and retain for its services whatever it was

able to sell the land for, over and above $92.50 per acre. The Investment Company succeeded in finding a buyer willing to take the land at $100 per acre, and accordingly an agreement of purchase and sale was entered into with the prospective purchaser, subject, of course, to Council's approval. The contract was forwarded to Council, then living in California, and he was, at the same time, fully advised of Smith's arrangement with the Investment Company, and of the amount which the Investment Company would claim as its commissions, if the sale went through, to-wit, $7.50 per acre, by his local agent, Smith, the local bank with which the papers were deposited, and by a Mr. Breckenridge, who was jointly interested with Council in the land sold. Possessed of this information, without protest of any sort, Council signed the contract of purchase and returned the same to Colorado, whereupon the deal was closed, the buyer paying the money over for the land. Thereupon, Council paid Smith $2.50 per acre as his compensation, but repudiated *in toto* the claim of the Investment Company, insisting that he had made no contract with and was in no manner obligated to it. In other words, plaintiff in error appears to take the untenable position that he can take advantage of that part of Smith's agreement with the Investment Company favorable to himself, and repudiate the remainder; that he can make a profitable and satisfactory sale to a customer produced by the Investment Company, with full knowledge of the terms of the contract or agreement which the Investment Company had made with his local agent, Smith, and knowing what the Investment Company would claim by way of commissions for making the sale, and still ignore such claim.

Under any circumstances of which we can conceive, this would be inequitable, but under the circumstances of the present case it would be peculiarly unjust, since the record discloses that the customer to whom the land was sold had been brought from a distant state by the Investment Company, at heavy expense to itself, and a sale had been made to this cus-

tomer at a price which netted plaintiff in error something more than $3,000 in excess of what he had offered to sell the land for shortly prior to the time Smith interested plaintiff in it.

The judgment of the trial court is affirmed.

Judgment Affirmed.

[No. 4015.]

DYGERT, ET AL. v. CLEM, ET AL.

1. ATTACHMENT—*A Legal Remedy—Statutes Strictly Construed.* An attachment is a special remedy of law, except where authorized by statute in equitable causes. (287, 288)

And the code provisions (Rev. Code secs. 98, 99) are strictly construed. (287)

2. —— *Affidavit*, must show an indebtedness. (288)

The complaint alleged that defendants represented that one Glasgow would be, with plaintiffs and defendants, one of the purchasers of a horse, and on the faith of this promise, and the further promise that if Glasgow should not sign the promissory notes for the purchase money, subscribed by plaintiffs, it should be returned and cancelled; that, in fact, Glasgow had taken no interest in the horse, had never signed the notes, and that defendants had refused to return them and plaintiffs feared that defendants would negotiate the notes. *Held* that these averments constituted the basis of a suit in equity; that neither of the notes having been paid by plaintiffs no indebtedness from defendants to plaintiffs existed. (287, 288)

3. PROMISSORY NOTE—*Delivery on Condition*, that it is not to be obligatory until subscribed by a third person is void in the hands of the original payee, if the condition is not performed. (288)

In an equitable suit for the purpose it is proper to decree surrender of the notes, which is equivalent to a cancellation, in the hands of defendants. (289)

But judgment for the amount thereof was reversed, without prejudice to any right of action then existing, or any supplemental pleading allowed according to law. (289)

Error to Morgan District Court. HON. H. P. BURKE, Judge

MESSRS. TAYLOR & PENDELL for plaintiffs in error.

MR. WALTER S. COEN for defendants in error.

MORGAN, J.

The lower court overruled a general demurrer to the complaint, and a motion to dissolve the attachment, and, on defendants' election to stand on the demurrer and motion, entered judgment, sustaining the attachment and requiring that defendants, Dygert and Cockran, deliver up three certain promissory notes of $700 each, or, that plaintiffs recover from them $2,100 and interest. These two defendants bring error.

The court erred in sustaining the attachment. The first section of the attachment act (Sec. 91, Mills' Ann. Code) specifically provides that an attachment may issue in "an action on contract express or implied." Sec. 92 provides that the affidavit in attachment must state that the defendant is indebted to the plaintiff. These provisions have been strictly construed. *Goss v. Bd. of Co. Comrs.*, 4 Colo. 468; *Mentzer v. Ellison*, 7 Colo. App. 315. This action is not on a contract, or an indebtedness. The complaint states that defendant Dygert, as agent of defendant Cockran, by fraudulent representations that one Glasgow would be one of the purchasers of a certain horse and would sign the three notes aforesaid, and that the notes would be returned and destroyed if he did not, induced the plaintiffs and Swisher (who was made a defendant because he would not join in the suit) to sign the notes and deliver them without Glasgow's signature; that before the horse was delivered the plaintiffs ascertained that Glasgow had not taken any interest in the horse or signed the notes; that plaintiffs fear the defendants Dygert and Cockran will negotiate the notes; that they refused to perform the contract on their part to "the very great damage of these plaintiffs." The prayer was for an injunction restraining the defendants from disposing of or making use of said notes; that they be delivered up and cancelled; that in case they were not delivered up, that judgment be rendered for the amount of said notes and interest.

These averments constitute the basis of a suit in equity to restrain the negotiation and require the cancellation of the notes. The remedy by attachment is a special remedy at law,

except in some states where it is authorized in chancery. Drake on Attachments (7th Ed.), Sec. 4a. It is contended that the promise, that the notes would be returned and destroyed if Glasgow did not sign them, constitutes the contract, and its breach the damages claimed; but such promise was merely a condition precedent to the taking effect of the purchase and sale of the horse and the validity of the notes, and is a constituent element of the contract of purchase and sale, inseparable therefrom. Independent of the contract of purchase and sale, it has no consideration, and an attachment cannot be predicated upon it. Furthermore, neither one of the notes had been paid by the plaintiffs and no indebtedness existed from defendants to plaintiffs, or could exist, until they paid the notes.

The foregoing disposition of the attachment shows that the judgment for $2,100 was erroneous. If there was no indebtedness due from defendants to the plaintiffs and no damages accrued, a judgment for the same cannot stand, even if the notes were not delivered up for cancellation.

Now, as to that part of the judgment ordering the notes to be delivered up for cancellation. No evidence was introduced, and, on the general demurrer, the complaint must be taken for all that may be reasonably inferred from matters well pleaded therein.—*Supply Ditch Co. v. Elliott,* 10 Colo. 327, 15 Pac. 691, 3 Am. St. 586; *Marix v. Stevens,* 10 Colo. 261, 15 Pac. 350. And in *Logan v. Clough,* 2 Colo. 323, 327, it is said "that a demurrer cannot be sustained if any proof, properly called for by, and properly founded upon, the allegation in the bill, can make the case a proper subject for equitable jurisdiction," citing *Bleeker v. Bingham,* 3 Paige 84; *Francis v. Wells,* 2 Colo. 660, 669. The purport of the complaint is to charge that the three notes were delivered with the understanding that they were to be void and of no effect if Glasgow did not sign them and thus take an interest in the horse. Promissory notes, signed and delivered under an express agreement and condition that they are not to be-

come obligatory until signed also by another person, are void at the option of the makers, in the hands of the original payee, if not signed by such other person. 1 *Daniels on Neg. Insts.*, Sec. 68a. Hence it was not error to enter the judgment ordering the notes to be delivered up, as this was equivalent to cancellation in the hands of the defendants, Dygert and Cockran, and equivalent to a permanent injunction against a transfer of the notes by them. As all three of the notes are now due, the reversal of that part of the judgment sustaining the attachment and for the $2,100 is not intended to operate against any right of action that may now exist, or against any supplementary pleading on the part of plaintiffs, allowed by law.

The judgment of the lower court is, therefore, affirmed as to that part of it ordering the notes to be immediately delivered up, and reversed as to that part of it sustaining the attachment and giving judgment for $2,100, with costs of both courts to be paid by the plaintiffs in error.

[No. 4060.]

MONYHAN, ET AL. V. WOLFF.

Action for Frauds perpetrated by agent upon the principal. Judgment for the plaintiff, amply sustained by the evidence, Affirmed.

Error to Denver District Court. HON. JOHN A. PERRY, Judge.

MR. JAMES J. MCFEELEY for plaintiffs in error.

MR. PHLLIP HORNBEIN for defendant in error.

Per Curiam.

This action was brought by defendant in error, plaintiff below, to recover, from certain of the plaintiffs in error, real estate and personal property belonging to her and situated in

the Cripple Creek district. From the evidence it appears that the Monyhans, who were representing defendant in error as her agents in a real estate deal, fraudulently secured title to property belonging to her and involved in this action, and while thus holding title to said property, collected a considerable sum of money as rent therefrom. The court, on evidence which abundantly justifies its judgment, ordered the cancellation of certain incumbrances placed upon the property by the Monyhans, thereby restoring the property in question to defendant in error. The court also rendered judgment against the Monyhans, and in favor of defendant in error, for the net amount of rent which they had collected from the property. This feature of the judgment is also amply supported by the evidence. There are no questions of law involved which demand a consideration at our hands, and no occasion exists for the preparation of a formal opinion.

The judgment of the trial court is affirmed.

Affirmed.

[No. 4067.]

CITY OF BOULDER V. STEWARDSON.

1. EVIDENCE—*Measure of Proof Required.* About ten days previous to the injury complained of defendant's employes had left upon the margin of the street, a steam roller and the coal wagon used with it. As plaintiff was driving upon the street about 5. P. M. on the 18th of November, the horse, near the steam roller, veered from the street to the curbing; the buggy was upset, and plaintiff and another lady with her, were thrown out. The horse himself escaped, but was afterwards captured, with the buggy and harness badly damaged. Plaintiff had not seen the steam roller before the accident or afterwards. Immediately before, or at the instant the horse bolted, the other lady exclaimed, "O, what's that." This exclamation, or what occasioned it, was not explained. The only occupants of the buggy were the plaintiff, the other lady, and two children whose ages were not shown. No attempt was made to show that the misconduct of the horse could be attributed only to fright at the presence of the roller. The other lady, although within the state, was not called. The inference that the presence of the steam roller occasioned the fright of the horse, if he was frightened, it was said, was therefore based wholly on presumption, while the facts shown would as reasonably warrant a different inference. It was held therefore that inasmuch as mere theories and inferences do not authorize a verdict in

causes of this character, unless the conclusion of liability is the only one which can reasonably be drawn from the facts proven, the plaintiff had failed. (291-293)

2. Presumptions—*Upon Presumption.* One presumption is not to be founded upon another. (294)

3. Damages—*Pleading as to.* Action for personal injuries. There was no allegation of medical expense, nursing, or loss of time. An instruction to make an allowance on account of any of these matters was held error. (294, 295)

So as to an instruction to allow plaintiff for any loss of power to earn money, there being no allegation upon the subject. (295)

4. Pleading—*Negligence Occasioning Fright of Plaintiff's Horse.* The complaint should allege that the horse was an ordinarily gentle animal. (296)

5. Judicial Notice—*Not Taken,* that a steam roller standing unused on the margin of a street is calculated to frighten an ordinarily gentle horse. (297)

Error to Boulder District Court. Hon Neil F. Graham, Judge.

Mr. H. E. Rowland, Mr. J. T. Atwood for plaintiff in error.

Messrs. Rinn & Archibald, Mr. T. A. McHarg and Mr. T. M. Robinson for defendant in error.

Cunningham, Presiding Judge.

While driving a horse and buggy upon a street of the city of Boulder, plaintiff was thrown from her buggy and sustained certain injuries as a result of the accident. She brought her action against the city, and had judgment, from which the city prosecutes error.

The facts necessary to a proper understanding of the case are substantially as follows: The city owned a steam street roller which it used for the purpose of maintaining the streets of the city in proper repair. About ten days prior to the accident this roller was left by employees of the city upon the extreme margin of one of its public streets, together with a coal wagon used in connection therewith. About five o'clock in the afternoon of November 21, 1911, while plaintiff was driving along the street where the roller was standing, her horse veered from the main street on to the curbing, resulting

in plaintiff and another lady who, with her two children, was in the buggy at the time, being thrown to the ground. The horse escaped and afterwards was found not far from the scene of the accident, with the buggy and harness badly damaged, portions of the buggy being demolished. There was no lantern or artificial light upon the machine, but there was an arc light about forty feet from where the roller was standing, the current of which had apparently, at the time, not been turned on by the city. Plaintiff insists that at that time in the evening it was quite dark, while it is insisted on behalf of the city that it was yet light; in the view we shall take of this case, it is not necessary to determine this contention. On the stand plaintiff admitted repeatedly that she did not see the steam roller before, at the time of, or after the accident, and only knows it was upon the street at the point stated by what she had been told. We have been able to find no evidence whatever, either in the printed abstract or in the original bill of exceptions, proving or tending to prove that the animal took fright at the steam roller except that it was near the steam roller at the time the buggy was overturned; indeed, the contention that the horse took fright at all seems to rest rather upon presumption than direct evidence. The mere fact that the animal ran upon the curbing might well have been due to a sudden giving way or breaking of some portion of the harness or vehicle to which it was attached. We shall later refer to this feature of the evidence. Plaintiff testified that immediately before, or at the instant, the horse bolted, her companion, Mrs. Brown, exclaimed, "Oh, what's that?", and before she, the plaintiff, "had time to notice what she, Mrs. Brown, was referring to, or anything about it, the horse had run upon the parking, turning the buggy over, and turned them out; the parking on the side of the street." The record is utterly silent as to what Mrs. Brown had seen or heard to occasion her exclamation. Plaintiff did not pretend to know what had attracted Mrs. Brown's attention, and, although residing at the time of

the trial in Trinidad, Mrs. Brown was not produced as a witness, and no explanation was made of her absence from the trial. The age of Mrs. Brown's two children who were in the buggy at the time of the accident, is not made to appear. There were no other eye-witnesses to the accident than the occupants of the buggy. Not the slightest attempt was made by plaintiff on the trial to exclude any or all other possibilities or probabilities that the animal may have run from the street upon the curbing from some other cause than fright occasioned by the presence of the steam roller.

1. Beyond the fact of the location of the steam roller, there is no direct proof of any fact tending to show why the horse took fright, if it was frightened. The inference that the steam roller occasioned its fright is therefore based wholly upon a presumption, which just as reasonably warrants a different conclusion.

"Mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven."—*A. T. & S. F. R. R. Co. v. McFarland,* 2 Kans. App. 662, 43 Pac. 788.

In *Railroad Co. v. DeGraff,* 2 Colo. App. 42, 29 Pac. 664, the court, in commenting upon the cause of a fire alleged to have been started by a railroad company, aptly says:

"The fact of the origin of the fire, like any other material fact, should be established; and while the jury, within certain limits, may be left to infer the fact from the circumstances proved, such proof ought to be sufficient to rebut the probability of the fire having originated in any other manner."

In *Sheldon v. Ry. Co.,* 29 Barb. 226, it is said that:

"It is not enough for the plaintiff to show a possibility that the fire was communicated to the mill by sparks emitted by defendant's locomotive. He can not recover upon a possibility. Even if the evidence went further and brought the facts sought to be proved to within a probability, still the plaintiff must fail; because, to justify a verdict, the law re-

quires, not positive proof it is true, but such proof as will leave no reasonable doubt of the existence of facts upon which it must rest. The rights of property and all claims to its possession and enjoyment are dependent upon the existence of certain facts, and when they are disputed, and become the subject of judicial investigation, if juries could assume their existence without sufficient evidence, and render verdicts upon possibility, probability and conjecture, the courts would be shorn of their legitimate authority, and wise and just rules of common law as they have been recognized and applied from time immemorial, would lose their principal value." *M., K. & T. Ry. Co. v. Wilder,* 3 Ind. T. 85, 53 S. W. 490; *Chicago R. R. Co. v. Rhoades,* 64 Kan. 553, 68 Pac. 58; *U. P. Ry. Co. v. Bullis,* 6 Colo. App. 64, 39 Pac. 897; *D. & R. G. Co. v. Robinson,* 6 Colo. App. 432, 40 Pac. 840; *R. R. Co. v. Priest,* 9 Colo. App. 103, 47 Pac. 653; *C., B. & Q. Co. v. Church,* 49 Colo. 582, 114 Pac. 299; *Douglass v. Mitchell Ex'r.,* 35 Pa. 440; *National Bank v. Graham,* 100 U. S. 699, 25 L. Ed. 750.

2. As we have already said, the contention that the horse ran from the street and overturned the buggy, as a result of fright, seems to rest upon presumption, rather than upon direct proof, and it is clear that the contention that the horse was frightened by the steam roller is based upon presumptions wholly. Therefore, we have the vice which the authorities uniformly condemn, viz: basing one presumption upon another presumption.

Globe Accident Ins. Co. v. Gerisch, Admrx., 163 Ill. 625, 45 N. E. 563, 54 Am. St. 486. 16 *Cyc.* 1051-1087. 1051-1087.

3. Instruction No. 21, given by the trial court, bearing upon the measure of damages, reads in part as follows:

"You are further instructed that if you find for the plaintiff, it will be your duty to compensate her for damages she has sustained and include all expenses she has incurred

owing to the injury received, such as medical expense and for nursing and attendance, if any."

There was no allegation in the complaint, and no proof warranting the submission to the jury, for their consideration, the question of medical expense, or expense for nursing and attendance. Proceeding, in the same instruction, the jury was told that it might, "also allow her for lost time." There was no evidence whatever in the record and no allegation in the complaint, to warrant the submission of this question to the jury. In the same instruction the jury was advised as follows:

"You may also allow the plaintiff damages for any permanent injury, if any has been shown by the evidence, and for the reduction of plaintiff's power to earn money in the future, caused by the injury, and in doing this you should take into consideration plaintiff's age, her probable expectancy of life, * * * all of which are circumstances to be weighed in arriving at a fair pecuniary compensation to plaintiff for the permanent injury, if any received, and in the impairment of plaintiff's future earning capacity, if you find from the evidence that the same has been impaired."

Plaintiff was a married woman, residing with her husband; there was no evidence offered as to her power to earn money, either prior or subsequent to the injury, and there was no allegation in the complaint tendering an issue of this sort. Neither was there any evidence introduced as to plaintiff's probable expectancy of life. We are forced to conclude, for the reasons pointed out, that instruction No. 21 was fatally defective, and the giving of it, under the pleadings and the proof as disclosed by the record before us, highly prejudicial to the city. In view of the probability of another trial, we call attention to *D. & R. G. Co. v. Young,* 30 Colo. 349, 70 Pac. 688, wherein the right of a married woman to recover for loss of time and the impairment of her future earning capacity is fully discussed. The instruction criticised in the Young case, we find from an examination

of the original record in that case, was strikingly similar to instruction No. 21 in the instant case. In part that instruction reads as follows:

"You may give her such a reasonable amount as will compensate her for her inability to perform manual labor that may appear to have been caused by reason of receiving such injury. And in fixing the amount of such compensation, you have a right to take into consideration the loss of time plaintiff has sustained by her inability to labor, her doctor's bills, and her expenses incurred, if any. * * * It is also your duty to take into consideration any such disability the plaintiff may have proven that she has received, and her diminution of power in gaining a livelihood in the future."

The *Young* case is reviewed and commented upon in *C. S. & I. Ry. Co. v. Nichols,* 41 Colo. 272, 92 Pac. 691, 20 L. R. A. (N. S.) 215, and the Nichols case is elaborately annotated in 20 L. R. A. (N. S.) 215, where the question of the rights of a married woman to recover for loss of time, etc., is ably and exhaustively considered. See also *Town of Salida v. McKinna,* 16 Colo. 523, 27 Pac. 810, wherein the court ruled that testimony to the effect that plaintiff had spent, "for medicines, stimulants and other necessaries for her benefit, and that the same 'might amount to $200, probably,'" was too indefinite to found a recovery upon. See also: *City of Wyandot v. Agan,* 37 Kans. 528, 15 Pac. 529; *A. T. & S. F. R. R. Co. v. McGinnis,* 46 Kans. 109, 26 Pac. 453; *Denver Tramway Co. v. Riley,* 14 Colo. App. 132, 59 Pac. 476; 5 Am. & Eng. Enc. of Law, Sec. 557; 3 Sutherland on Damages (2nd Ed.) Sec. 952.

4. It is vigorously contended on behalf of the city that the complaint is fatally defective in that it contains no allegation to the effect that the horse which plaintiff was driving was an ordinarily gentle animal, and the evidence, it is also contended by counsel for the city, falls short of establishing this fact. There appears to be authority supporting the contention with reference to the alleged defect in the complaint.

28 *Cyc.* 1380-1; *Elam v. Mt. Sterling,* 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.).

The only evidence which we discover tending to show that the steam roller was an implement calculated to frighten ordinarily gentle horses is that the horse in question was an animal that frightened at nothing except steam engines, or some other similar object, and the testimony of two witnesses residing near where the roller was standing that they had observed on several occasions horses that were being ridden or driven by the machine become frightened. Whether or not the horses which these witnesses had noticed were ordinarily gentle, and city broke does not appear. Courts can not properly take judicial notice that a steam roller standing unused on the margin of a street is an object calculated to frighten ordinarily gentle animals, especially city broke animals, which, in these days, are constantly passing and being passed by all of the various instruments of transportation, such as street cars, and automobiles of every size and make.

The judgment of the trial court will be reversed, and the case remanded, with leave to the plaintiff to amend her complaint as she may be advised.

Reversed and remanded.

[No. 4074.]

McCreary v. Brady, et al.

1. Pleading—*Demurrer, for ambiguity,* must show the particulars wherein the ambiguity exists. (299)

2. Appeal from Justice—*One of Several Appealing.* Judgment before a Justice of the Peace against Brady, Bauman and the Crescent Company. Brady alone appealed, and gave bond, reciting that *he* had taken an appeal to the County Court, and in the words of condition, following the statute. On trial in the County Court Brady and the company were discharged and judgment given against Bauman. *Held* that Brady had prosecuted his appeal with effect; and that under the statute he was not chargeable upon the condition of the bond to pay "whatever judgment may be rendered." (303, 304)

3. —— *Trial in County Court, upon Appeal from Justice,* is to be *de novo,* in a summary way, without written pleadings. No review of the judgment of the Justice is had, nor any attention paid to the proceedings before him. Each party has the same right in presenting his cause as if the action had originated in that court. (301)

Distinction in the effect of an appeal with trial *de novo,* and an appeal in the nature of a writ of error, noticed. (301)

Error to El Paso District Court. HON. J. E. LITTLE, Judge.

MR. J. N. RICKARDS for plaintiff in error.

MR. WM. SWIFT for defendants in error.

BELL, J.

As appears from the pleadings herein filed, John C. McCreary, plaintiff in error and plaintiff below, hereinafter called the plaintiff, on the 9th day of December, 1912, recovered a judgment in the sum of $28.95 and costs against S. A. Brady, C. C. Bauman and the Crescent Laundry before J. D. Faulkner, a justice of the peace of El Paso county, Colorado. S. A. Brady, one of said defendants, alone effected an appeal to the county court and secured there a trial *de novo,* which resulted in a verdict in favor of him and the Crescent Laundry, and against the defendant, said C. C. Bauman, in the sum of $28.95. Whereupon judgment was rendered by said county court against said C. C. Bauman for the sum of $28.95 debt and the further sum of $17.45 cost of suit. In perfecting said appeal, S. A. Brady, Stephen A. Brady and Nick Hamelton, defendants in error herein and defendants below, signed an undertaking or bond, the condition of which reads as follows:

"The condition of the above obligation is such that, whereas, the said John C. McCreary did, on the 9th day of December, A. D. one thousand nine hundred and thirteen, before J. D. Faulkner, a justice of the peace in and for the county of El Paso, and state of Colorado, recover a judgment against the above bounden S. A. Brady and C. C. Bauman and the Crescent Laundry for the sum of twenty-eight dollars

and ninety-five cents, and costs of suit, taxed at $5.20, from which judgment the said S. A. Brady has taken an appeal to the county court, of the county of El Paso and state of Colorado. Now if the said S. A. Brady shall prosecute said appeal with effect, and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect.

(Signed) S. A. Brady (Seal)
Stephen A. Brady (Seal)
Nick Hamelton."

Upon this bond the present action was instituted against the signers thereof in the district court of El Paso county, the complaint alleging that, upon the filing of said appeal bond, a supersedeas was issued, at the request of said S. A. Brady, preventing the said John C. McCreary from collecting the judgment obtained by him before the justice of the peace; that upon a trial of the action in the county court, a verdict and judgment were rendered and entered in favor of said S. A. Brady and the Crescent Laundry, and against the defendant, C. C. Bauman, in the sum of $28.95 debt and the further sum of $17.45 cost of suit; that said defendants have not paid the judgment rendered against said Bauman, as required by the terms of said appeal bond, and the suspension of the plaintiff's right to enforce said judgment; and that the affirmance of said judgment against said Bauman made all of the signers of said bond liable therefor.

The district court sustained a demurrer to the complaint, filed by the defendants in error herein, for failure to state facts sufficient to constitute a cause of action, and for ambiguity. No facts showing ambiguity being alleged in the demurrer, that cause is not sufficiently set forth to justify this court in considering it.

Ordinarily, where an appellant from a judgment of a Justice of the Peace on the trial in the County Court obtains

a judgment relieving him from any responsibility for the claim sued on in the justice's court, he is held to have prosecuted his appeal with effect. However, it is contended here that, by reason of the appeal by the successful defendant, S. A. Brady, and the issuance of a supersedeas deferring the plaintiff's right to proceed with the collection of the judgment against the non-appealing defendants in the justice's court, such successful defendant, while not liable on the claim sued upon, is liable on the appeal bond under that part of it requiring him and his sureties to pay "whatever judgment may be rendered by the court upon dismissal or trial of said appeal."

The purpose of the appeal of the appellant Brady was to secure a judgment of the County Court holding him not liable for the claim upon which the Justice of the Peace rendered judgment against him, and he fully succeeded in his purpose. Is it probable that, when the legislature enacted Section 4416, 2 Mills' Ann. Statutes, Revised 1912, permitting one or more plaintiffs or defendants, in causes decided by Justices of the Peace, to appeal to the County Court without the consent of their associate parties, it was the purpose to allow him or them no escape from an unjust judgment without also securing the same relief for the other defeated parties? Under section 4419, 2 Mills' Ann. Statutes, Revised 1912, the appellate County Court is required to hear and determine the cause in a summary way according to the justice of the case, without pleadings in writing. There is no review of the judgment of the justice's court or any attention whatever paid to its proceedings at the trial, but the County Court awards a *de novo* trial, and renders its own judgment on the evidence taken by it: *Lee v. Ralston,* 1 Colo. 5. The proceedings of the justice and the appeal bond, when regularly filed, perform the office of bringing the parties and subject matter before the appellate court, not for the purpose of reviewing the evidence or proceedings at the trial before the justice, but the law gives the appellant the right to a full and complete trial in the County

Court, ignoring and wholly disregarding the evidence taken and the judgment rendered by the justice. Each side has the same right to present its cause on appeal when brought from a Justice of the Peace as it would have if the case had been brought in the County Court by the issuance and service of a summons therefrom, except that the proceedings lack written pleadings and the summary trial is required as aforesaid. No one would question the right of the successful parties to complete relief by a judgment of the County Court if they and the subject matter had been brought there as an original suit.

Conceding this then, as we must, we are wholly unable to discover any pertinent reason why the same rule should not apply on this appeal where the trial was *de novo* and the justice's proceedings and the appeal bond had only the effect of giving the County Court jurisdiction for a *de novo* trial without written pleadings. Some courts draw marked distinctions between the condition of judgments when appealed to a court where the proceedings of the trial court is reviewed and the judgment is affirmed or reversed, and those that are appealed to a higher court for trial *de novo*. In speaking of this distinction as made by the Connecticut courts, Freeman on Judgments, 4th Ed., sec. 329, says:

"If the latter (appellate) court has authority to try the cause *de novo*, and to settle the controversy by a judgment of its own, and to enforce such judgment by its own process, then it is plain that by the appeal the judgment of the inferior court is not merely suspended, it is vacated and set aside, and can no longer have effect as an estoppel. But if the appeal is in the nature of a writ of error, conferring power on the appellate court to determine such errors as may have occurred at the trial or in the decision of the cause, and giving the court, upon such determination, no other authority than that of reversing, modifying, or affirming the judgment of the inferior court and of remitting the case back to the tribunal whence it came, that such tribunal may conform its judgments and proceedings to the views of its superior, then the judg-

ment appealed from does not, until vacated or reversed, cease to operate as a merger and a bar." Freeman, *supra,* citing *Bank of N. A. v. Wheeler,* 28 Conn. 433, 73 Am. Dec. 683; *Curtis v. Beardsley,* 15 Conn. 518.

Neither counsel nor the court have succeeded in finding a case involving all of the features of this case. *Moore, et al. v. Mulvane,* 6 Kan. App. 191, 193, 51 Pac. 569, 570, however, is almost identical, with the exception that the bond was signed by but one of the defendants but purported to be filed on behalf of them all, and it was contended by the defendant who signed the bond that the appeal was taken as to himself alone, and he introduced evidence tending to show that such was his intention and the intention of his attorney who filed the bond. In considering the case, the Kansas Court of Appeals declared that:

"The presumption is that, when an appeal bond is filed in a case purporting to be for all the defendants, it is with their consent and approval. They were at liberty to appear, and disaffirm the appeal, but, failing to do so, we think we are bound to assume that they indorsed and approved it. The question in this case is not as to the weight of the evidence. *If there was any legal evidence that said bond did not appeal the case from the justice of the peace as to all of the defendants, then the judgment of the court below would be affirmed;* but we do not think that there was any. There was evidence tending to show that Mr. Updike did not intend to appeal for any one but himself, but the fact remains that he did appeal for all, and to allow his present testimony as to his intention to outweigh his acts would be to establish a very dangerous precedent." (The italics are mine.)

In the instant case the bond shows upon its face that S. A. Brady alone appealed and the sureties on the bond obligated themselves only that he should prosecute his appeal with effect and pay whatever judgment might be rendered.

Young v. Ditto, 2 J. J. Marsh (Ky.) 72, cited in 2 *Cyc.* 936 (b) to the effect that "where one of several defendants

appeals from a joint and several judgment, the appeal bond is security for the entire judgment upon affirmance," and also cited by counsel for plaintiff in error as authority in this case, does not seem to be pertinent. The facts in the *Ditto* case are quite different from those we are considering. The trial court in that case rendered several and joint decrees, one against Ditto for $171.50, and one against his associate defendant Kelso for $198.00, and a joint decree against both for costs, and the case on appeal in the higher court was not tried, but was dismissed because the court held that the appropriate remedy was by a writ of error and not by an appeal, and the appeal bond sued upon provided that the sureties should "pay the judgment, if affirmed or dismissed." The appeal was dismissed and, of course, they were required to pay.

We have also examined 2 *Cyc.* 936 (c), cited by counsel for plaintiff in error as in point. This authority reads:

"In the case of a joint appeal by several appellants from a judgment against all, a reversal as to one or more, and affirmance as to others, will be a breach of condition affecting those as to whom the affirmance was rendered, unless liability on such a contingency is contrary to the terms of the bond, in which case, all of co-principals are individually bound for the judgment affirmed if, by the terms of the bond, they can be regarded as co-sureties—otherwise not."

There was no joint appeal in the instant case, nor was there an affirmance of the judgment against the appellant. The appeal bond in the instant case was conditioned that if S. A. Brady should prosecute said appeal with effect and pay whatever judgment might be rendered on dismissal or trial of said appeal, then the obligation to be void, otherwise to be and remain in full force and effect. On the *de novo* trial, the court found that neither S. A. Brady nor the Crescent Laundry was liable on the claim sued upon in the justice's court, and discharged them from any liability therefor, and rendered judgment in favor of the plaintiff John C. McCreary and against the defendant C. C. Bauman for $28.95 debt and

$17.45 costs. Bauman was not an appellant, was not a party to the appeal bond, and there is nothing before us showing that he in any way participated in the *de novo* trial in the County Court or resisted the judgment rendered against him either in the justice's or county court.

We think that, by applying a reasonable construction to our statute, we must say that, when S. A. Brady secured his release from any liability on the claim sued upon, he prosecuted his appeal with effect, and that it was not the intention of the legislature that he should be required to pay the judgment rendered in the trial upon appeal against Bauman, and that there is nothing in the appeal bond that shows that there was any such purpose in view when the same was executed and approved.

We think that the demurrer was properly sustained, and the judgment of the District Court is, therefore, affirmed.

Affirmed.

[No. 3785.]

PARKDALE FUEL COMPANY v. TAYLOR.

1. NEGLIGENCE—*Circumstantial Evidence,* is sufficient to establish; direct evidence is not required. (315)

2. —— *Evidence—Sufficiency.* Action for the death of one employed in a coal mine, attributed to negligence of the mine owner in failing to provide places of refuge, along the slope where the cars were operated for removing the coal, and the employes were wont to pass in going to and from the lower workings; also in failing to provide proper appliances to prevent the escape of cars into the slope.

Evidence examined and *held* sufficient to warrant a verdict for plaintiff. (306-315)

3. APPEALS AND ERROR—*Verdict on Conflicting Evidence,* is conclusive in the court of review. (315)

4. ATTORNEY—*Misconduct.* Action against a mining company for negligence causing the death of an employe in the mine. Plaintiff's counsel, in the examination of a juror on the *voir dire* asked if he was acquainted with the counsel appearing for the company, "who," he said, "represent the Ocean Insurance Company in this case." This assertion of counsel was a mere assumption, not justified by any evidence, and, as the court concluded, was an attempt to impress the jury with the idea that a verdict against the defendant would not be injurious to it. The

court denounced it as "very reprehensible," justifying a reversal of a judgment in favor of plaintiff, where the evidence was equally balanced, or it appeared probable that the irrelevant matter so improperly brought to the attention of the jury had exercised a controlling influence in their deliberations. (316)

Appeal from Boulder District Court. HON. HARRY P. GAMBLE, Judge.

MR. JULIAN G. DICKINSON and MR. A. H. FELKER for appellant.

MESSRS. DAVIS, WHITNEY & MOTHERSILL for appellee.

On rehearing.

BELL, J.

Appellee, plaintiff below, hereinafter called the plaintiff, charges in her amended complaint that her husband, Job O. Taylor, while in the employ of The Parkdale Fuel Company, appellant and defendant below, hereinafter called the defendant, was killed as the result of its negligence in failing to provide places of refuge along its slope in its coal mine, known as the Parkdale mine, located in the town of Lafayette, County of Boulder, and State of Colorado, as required by the provisions of R. S., 1908, sec. 644, and in failing to furnish proper safety devices and appliances at the head of said slope, near the tipple, so as to prevent the escape of cars down said slope. She further charges that the death of her husband was caused by the negligence of one Stephen Gobo, a fellow servant and co-employe, for which she contends the defendant company is liable under the provisions of sec. 1, ch. 67, Session Laws of 1901, sec. 2065, R. S., 1908, and alleges that his negligence consisted in his "failing to take the proper steps, and to do the necessary acts, to prevent the said coal car from leaving the tipple of the said mine until the said car was properly coupled and attached to other cars, and held under control by the cable which regulated the descent of said coal cars into the said mine."

On each of the three causes of action relied upon, she demands judgment in the sum of $5,000 and costs of suit.

The answer contains a general denial, and sets up, as defenses, the assumption of risk, and contributory negligence on the part of the deceased, and the invalidity of the act relied upon, known as ch. 67, Session Laws of 1901, providing for a right of action for injuries or death resulting from the negligence of a fellow servant or co-employe.

All of these defenses are denied in the replication, and the case was tried to a jury, which found for the plaintiff in the sum of $5,000, and upon the verdict, after overruling a motion for a new trial, the court entered judgment in accordance therewith.

There are numerous errors assigned, 54 in number, three of which are directed to an alleged misconduct of counsel in the examination of a juror on his *voir dire,* five to the admission of testimony over the objections of counsel, one to the amendment of the complaint, five to the application of the law and the weight of the evidence, and the remainder to the giving and refusing of instructions. The merits of the appeal, however, rest, in our opinion, upon the sufficiency of the evidence received at the trial to support the verdict of the jury and the judgment entered thereon.

The undisputed testimony shows that the slope in which the plaintiff's husband was killed was about 1,000 feet long and about eight feet wide in the vicinity of the accident, and that all the coal was taken from the mine through this slope in trips of four cars each. The rope or trip rider, Louis Evans, received the trips of loaded cars at the bottom of the slope, and rode on the front car of each trip, where the rope was attached, until the trip would reach the surface, where it was received by the men on the top of the slope, weighed, dumped, coupled together again by means of coupling pins, and made into a trip of empties to be returned to the mine through the slope, when the next loaded trip should reach the surface. When the loaded trip was over the knuckle, or

safely beyond the mouth of the slope, the trip rider would detach the rope therefrom and attach it to the trip of empties, and when the trip of empties was ready for descent, he would signal the engineer in the tipple house, and return with it into the mine. Stephen Gobo was employed on the top of the slope, or on the tipple, and it was his duty to receive and prepare the empty cars for descent. He had been ill with typhoid fever for a time, and commenced or resumed his duties the morning of the accident. To prevent an escape of cars down the slope, there was a block bolted to a plank some distance from the knuckle, or mouth of the slope, and this block was placed or swung across the rail or track while the empty cars were being prepared or made into a trip for descent; and when the descent was about to be made, the block was removed from the rail or track, and the cars moved to the mouth of the slope, whenever necessary, by the trip rider and Gobo until they acquired sufficient momentum to descend. At the time of the accident, there were about 100 men employed in the mine, and all generally entered and returned to their places of work through the slope. Their hours were from 7:30 a. m. to 4 p. m., and one trip of four cars was run at each of those hours for the men to ride into and out of the mine. Those trips were insufficient to accommodate all of the men, and, therefore, some of them were obliged to walk up and down the slope. A set of electric wires about three inches apart was strung along the side of the slope, from the bottom thereof to the tipple house on the surface, by which any person being or working anywhere on the slope might signal the engineer in the tipple house by making a circuit with a short piece of iron or metal, which the employes usually carried with them, and thus suspend the operation of the slope as long as necessary. Regarding the places of refuge, or safety holes in the slope, Thomas Page. the pumpman at the mine, a witness for the plaintiff, testified in part as follows:

"There was nothing regular about any specified amount of manholes up and down the slope. There was a hole on the right hand side of the slope about fifty feet from the knuckle, where they used to pull coal. Down where the second level runs off to the left there is a hole you might get into, but there is a track in there and the cars run. Twenty-five or thirty feet below there is a cross-cut leaves a little place for a man to jump into; either from the main slope or on the back slope to the track on the main slope has been graded down so you have to climb up from two to four feet. These are the only holes on the slope."

In this respect he does not seem to be contradicted. In fact, his seems to be the only testimony elicited by either party regarding the places of refuge or safety holes along the slope. He further testified that the slope "is about a 7x9 slope where it is mechanically dug, and it goes down to where it takes the first pitch down * * * there is places where you could probably stand like this and the car would probably pass you if it was on the track. There was nothing regular about the slope." In this he seems to be contradicted by H. H. Smith, foreman or pit boss at the mine, a witness for the defendant, who testified that the slope ranged from 8 to 20 feet wide. There were about 30 rollers along the entire length of the slope to prevent the rope from dragging on the ties and ground, and the average life of each roller was from a month to two months, so that it was necessary to repair or replace from 15 to 30 rollers per month. It was the duty of the deceased to do any "work that he had to do about the mine," to keep the slope in which he was killed in repair, and to examine, oil, clean and promptly repair or replace the rollers when necessary. No other person had charge of this work. He was a "handy man," or general repairman, about the mine, and was very competent in his work. Concerning his presence on the slope at the time of the accident and the attending conditions, Page, above named, testified in part as follows:

"He (Taylor) was under the supervision of the boss. Whatever the boss told him to do. * * * He seemed to be attending to the slope and doing carpenter work around the mine. I was what they call the pump-man. Pumped the water and laid pipes for air and water. * * * At the time of his death I was on a place they called the first level, just off to the left of where he was killed, probably two hundred feet away from him. I went immediately to the place. Prior to the day of this accident the pit boss (Mr. H. H. Smith) had sent Mr. Taylor to build me a little shop in the mine. * * * I didn't have a shop to work in and I called the attention of the pit boss, and he sent Mr. Taylor down to build anything I instructed him to build, so I told him what I would like to have, and he set about doing it. This was the day prior to the accident. He didn't get it finished that day. Next morning when we came to the mine, Mr. Taylor went into the mine as usual. He went ahead of the men and ahead of the cars to oil the rollers so that he would not be on the slope when the cars was going up and down. * * * Mr. Taylor come to me and says, 'I didn't get your shop quite done, but I will finish it right away as soon as I can. I am ordered to go up on the slope and fix a roller, but as soon as I get the roller fixed I will return down and fix your bench —your shop.' Well, Mr. Taylor had left me quite a little bit. The rope rider comes into the mine and says: 'Do you know where Old Man Taylor is?' I says, 'He went through the braddish to go up the back slope.' He says, 'You tell him if that roller isn't in the right place I will move it when I come back next trip. I have orders to put it off there, but I don't know whether I got it in the right place or not.' I says, 'You will find him on the slope, I think.' The rope rider went up with the usual trip. Mr. Smith come in and says, 'I told Taylor to put in that roller on the slope. Did he go to do it?' I says, 'I think he did.' The roller was right close to what we call the first knuckle down in the mine. I should say that from this first timber down to the roller was about three

hundred feet. The next time I saw Mr. Taylor he was dead, lying by a switch in the mine. It is quite a ways below this roller that was to be repaired. I should judge from 100 to 125 feet. I went right there. I was the first one that went there with Sam (deceased's son). I was there with Sam first. He was lying with his face in towards the roof and his hands like this, and his feet lying straight back under him like this way. I could not recognize the body. Did not know whether it was his father or not until after the son found his father's watch. I came to the conclusion that it must be his father. The car was on the other side of the track. * * * This accident occurred about nine o'clock in the morning. They found his watch stopped, but I don't remember the hour. * * * I went to work at seven-thirty that morning. I had this talk with Mr. Taylor in the mine right after we got on the bottom. He and I went a little before the men in order for him to grease the rollers. * * * There was something to indicate where the car struck Mr. Taylor. On the roof was the oil that came from the kegger, he used to fill his lamp with. The oil had splattered on the coal and on the roof. The body was found 75 to 100 feet below. A man traveling around in the mine carried his kegger because it carried his supply of oil. Mr. Taylor carried his strapped around his waist. There was a broken roller on the incline about three hundred feet from the top, from the first timber in the slope. The oil on roof and on the coal was down a few feet, from twenty-five to fifty and seventy feet below the broken roller."

The car referred to by Page as being on the other side of the track from the body of the deceased, or, in fact, the car involved in the accident complained of, was the first of a trip of four cars that was about to descend the slope in the usual manner of operation. The trip was attached to the rope, and was being moved by the men on the tipple, to the mouth of the slope, when the car in question escaped and ran wild down the slope. Mrs. Anna Klouse, an eye witness to

the escape of the car, called on behalf of the plaintiff, testified in part as follows:

"I live about a block from the tipple of the mine, right back of the tipple. I could see the tipple from my house. At the time of this accident, November 30th, I was standing in my kitchen door. I could see the loaded cars as they came up and the empty cars as they went down. I could see them push them in the place where they dumped them, but I could not see the men dump the cars. I could see as plain as I could see from my place, where they pushed the empty cars back as they would go over the knuckle and down the shaft. I think there were three men on the tipple at that time. I saw the runaway car as it left the tipple, and went down the shaft. I was looking that way at the time when it broke loose. I don't think the car was coupled. There were four empty cars in that trip. One went down the slope—the one that was coupled with the other three cars. The men put their back up against the cars to push them over the knuckle. Two men were there at that time pushing on the cars. Gobo was the name of one of the men and Louis Evans was the other. * * * When I saw this empty car—this runaway car—I went to the mouth of the slope. My husband was down to the blacksmith shop that day. He was working the day before. The empty cars just went off the tipple down into the slope. It was all that I seen after it went down the slope. All anyone seen I guess. When I got there Mr. Evans he had went down to see the man that was killed, and he was coming back up the slope."

On cross-examination, she testified as follows:

"I know that the car was not coupled because it didn't make any noise or it could not get away. I argue that because it could not have got away it wasn't coupled. I could not see from my place. I could not see if it was or if it was not. I could not see whether the car broke apart. It didn't make any noise. The other three cars, to my knowledge, stood where there were. They didn't go down the slope

at the time. They was up on the level ready to dump over when this other car went down the slope. This other car broke loose. I don't think those other cars broke loose. They stood still—stopped at once."

John Post, also a witness for the plaintiff, testified in part as follows:

"I was blacksmith at the mine. I was on the outside of the blacksmith shop when the car went down. I was standing about fifteen to eighteen feet away from the track. The car passed right by me. The loaded car come up as I stayed there. I was standing on the west side of the slope. The blacksmith shop is on the west side, about twenty-five feet away from the slope and I stood on the front of the blacksmith shop and as the car passed me here, I been about fifteen or eighteen feet away from the slope.

"Q. * * * You said that Louis Evans hollered to the man 'Are you ready?' A. Yes, sir, 'ready.'

"Q. What did the man say? A. The man says 'yes.' So he took the block out and Louie Evans got behind them empty cars; he is the rope rider; and another fellow helped pushing them about two feet and then the front car went off, and the rope rider went down and stopped the empty cars from going down, and he followed right into the slope.

"I can't tell you whether that car was coupled or not. The four cars is right there and he is around them cars. I see him around the cars when they stayed there, and I can't say as he coupled them or not. The front car run off. If it had been coupled it would not have run off."

Cross-examination:

"* * * Louis Evans and Stephen Gobo, were both together, at the top. Gobo pushed the block out. Gobo hollered down, 'Is everything all right.' He took the chain down from the loaded cars. He threw the chain down, about two feet, and then Louis Evans jumped down, and coupled the four empties and then he hollered at that man, if he is ready. I seen him going between the cars. I can't say that he

coupled them. I know that three were coupled, because they stood after the accident. He stopped the engineer right away as the front car run off. * * *"

Accidents of this kind had previously happened on the slope, and the dangers of being or working on the slope were well known to the deceased and other employes, but it was testified to by witnesses for the plaintiff that the men continued to assume the risks upon the promises of the officials of the company to improve conditions, and to make the necessary improvements to avoid the dangers complained of. The witnesses referred to are Mr. Frank Smith and Mr. Percy Brillheart, who testified that they, as representatives of the union, discussed the dangers complained of with Mr. H. H. Smith, foreman, and Mr. John Webb, superintendent of the mine, and Mr. Watson, general manager of the company. Mr. Webb, however, testified, as a witness for the company, that he never had any conversations with the witnesses named, except as to man-cars and a manway. Webb and Smith both testified that general instructions were given that no one was allowed to travel the slope during working hours, and that, prior to the accident, written notices to the same effect were posted; but at least four witnesses for the plaintiff testified that no such notices were posted until after the accident; and even Webb and Smith contradicted each other as to the place where said notices were posted—Smith testifying that they were posted on the side of the slope, and Webb testifying that they were posted on the front of the slope. Smith denied having instructed Taylor to repair any rollers the morning of the accident, or having talked to Page about Taylor repairing the same, as testified to by Page. Page testified that his duties required him to be on the slope at almost all hours of the day, but Smith contradicts him in this respect, as follows:

"I don't know what business Mr. Page had at any time on that slope. Not in reference to doing any work on that slope that I know of. There was nothing there for him to do in any way, shape or manner. * * * Page hadn't

any work on the slope at any time. Mr. Page had no instructions to go back and forth, he could order his pipe or supplies brought down by the trip rider."

He, Smith, however, appears to be in turn contradicted by Webb, whose testimony in the matter is abstracted as follows:

"Q. Now, Mr. Page was your pump-man? A. Yes, sir. * * *

"Q. Don't that pipe line go out this slope where you haul the coal? A. No, part of the way, and part of the way on the old slope.

"Q. It comes part of the way on the slope where you haul the coal? A. Yes, sir.

"Q. If that pipe got out of order, Page had to go up there and fix it? A. Yes sir, sure.

"Q. And in doing that he had to go upon the slope? A. If he fixed the pipe, yes sir.

"Q. Now, practically, that was the sole and only duty that Mr. Page had, was to take care of the pump and pipe line? A. No, he had more than that. He had to look after the air pipes and everything like that.

"Q. Did the air pipes go up and down the slope? A. Yes sir, the main air pipes.

"Q. So, if he had any trouble with those main air pipes, he had to go on the slope? A. Sure.

"Q. He had to in working hours? A. Well, I never seen him.

"Q. It wasn't what you saw? A. Yes sir, yes.

"Q. If he had to repair those things during working hours, he had to go the slope, whether you saw him or not? A. Yes, sir.

"Q. Now, if Mr. Taylor wanted to repair rollers, he had to go on the slope in working hours to do it? A. He had.

"Q. Whether you saw him or not? A. Yes sir, whether I saw him or not.

"Q. And he kept the rollers in repair? A. Yes, sir."

Under the foregoing condition of the record, we apprehend that it would be rather difficult to organize an impartial jury that would not find the defendant guilty of negligence, and especially in allowing the runaway car to escape from the tipple.

"In actions of this character, it is not necessary to show by eye-witnesses that the deceased came to his death because of negligence on the part of the defendant and freedom of negligence by the deceased. These matters may be proven by showing circumstances from which their existence may fairly and logically be presumed." *Hotchkiss Mt. M. & R. Co. v. Bruner,* 42 Colo. 305, 309, 94 Pac. 331, 332.

The jury found the issues for the plaintiff on somewhat conflicting evidence, and such a finding is binding on this court: *Big Five T. O. R. & T. Co. v. Johnson,* 44 Colo. 240, 241.

We have examined the numerous assignments of error, including those directed to improper testimony and to the instructions, and find none of them sufficiently serious to warrant a reversal of the judgment.

Defendant's assignments of error 1, 2 and 3, urging the misconduct of plaintiff's counsel (appearing at the trial in the District Court, but not upon this review) wherein the juror Tobias, on his *voir dire* examination, was asked,

"Do you know Mr. Felker or Mr. Dickinson, who represent the Ocean Insurance Company in this case?" have given the court serious concern.

The assumption of counsel that Messrs. Felker and Dickinson represented the Ocean Insurance Company in the case was voluntary and without justifiable excuse. There was no evidence whatever to support the assumption, and the court must conclude that the purpose of counsel was an endeavor to prejudice the minds of the jury by informing them that the Ocean Insurance Company had obligated itself to pay the damages sustained, and that a judgment against the defendant

would be without injury to it. Such conduct was not ethical, and was very reprehensible.

If a controlling question of fact in this case rested upon evidence that was quite equally balanced, or if the condition of the evidence was such as to make it probable that such extraneous matter wielded a controlling influence over the minds of the jurors, then it would be the duty of the court to reverse the judgment. In *Coe v. Van Why,* 33 Colo. 315, 321, 80 Pac. 894, 3 Ann. Cas. 552, the Supreme Court held it error for counsel, without any evidence upon which to base his statement, to comment in his argument to the jury upon the custom of mining companies to protect themselves against liability on account of injuries to their employes by taking out insurance, in insurance companies, against such liabilities. It was also held in the same case that the error was not cured by an instruction from the court to disregard the comments of counsel. However, in that case, the court said there were several closely contested questions of fact, and that there had been one mistrial of the cause. In *Tanner v. Harper,* 32 Colo. 156, 165, 75 Pac. 404, when the jurors were being empaneled, counsel for the plaintiff stated to them that an insurance company was the real party in interest. The Supreme Court held that the great weight of the evidence favored the plaintiff, and showed affirmatively that the defendants were not injured by such statement, and that it appeared from the record that there were no close questions of fact in the case.

From the state of the record in the instant case, it may well be said that the evidence is such that, in all probability, the same verdict would have been returned by the jury had counsel not been guilty of the reprehensible conduct of asserting, by inference at least, to the panel of jurors on a *voir dire* examination, that counsel for defendant represented the Ocean Insurance Company, and, therefore, it may be logically said that in this case it affirmatively appears from the record that the verdict was not the result of the misconduct of counsel,

but is sustained by sufficient evidence, and the judgment is, therefore, affirmed.

Affirmed.

HURLBUT, J., dissenting.

My dissent to the majority opinion is based solely upon a conviction that it is in direct conflict with the prior decisions of our Supreme Court.

The interrogatory propounded to the juror upon his *voir dire*, and upon which the validity of the judgment hinges, was as follows:

"Q. Do you know Mr. Felker or Mr. Dickinson, who represent the Ocean Insurance Company in this case?"

The question was promptly objected to, but the objection was not explicitly sustained by the court. The form of the interrogatory in no way tended to elicit from the juror any information or knowledge which might be a possible guide to plaintiff in the exercise of a peremptory challenge or one for cause. There was no issue formed by the pleadings which would permit of any evidence tending to establish the fact that either Mr. Felker or Mr. Dickinson was acting as counsel for the Ocean Insurance Company in the action being tried by the court. The form of the question precludes any assumption that the interrogatory was made in good faith, or for any other purpose than to directly prejudice the minds of the jury against the defendant. But one motive could have actuated the interrogatory in question, namely, to thereby communicate knowledge to the venireman interrogated, as well as all other prospective jurors present, that the Ocean Insurance Company was interested in the case, and would have to respond to any judgment that might be rendered against defendant; in other words, that The Parkdale Fuel Company was only the nominal defendant, while the insurance company was the real defendant in interest. The

commanding issue in the case to be tried by the jury was as to whether or not the defendant had been guilty of negligence in causing the death of plaintiff's husband. The record shows that the widow and children of deceased were present at the trial and testified. This fact of itself would have a tendency to enlist the sympathy of the jury for the misfortune overtaking the widow and orphans, through the deplorable death of their protector. Under these circumstances common justice required that defendant be accorded a fair and impartial trial of the issues, without the interpolation of any inadmissible matters which would tend to prejudice its rights. Can it be said, with even reasonable certainty, that defendant could hope for an unbiased and dispassionate consideration by the jury of the question of negligence, as between itself and plaintiff, if the jury believed, and had good reason to believe, that no verdict which they would render in favor of plaintiff would in the slightest degree affect The Parkdale Fuel Company, but any judgment founded thereon would have to be paid by one of the great insurance companies of the country?

The case of *Coe, et al. v. Van Why,* 33 Colo. 315, 80 Pac. 894, 3 Ann. Cas. 552, was a personal injury action wherein plaintiff's counsel, in his argument to the jury, commented on the custom of mining companies, in protecting themselves against liability on account of injuries to their employes by taking out insurance, there being no issue upon the matter. The trial court immediately admonished counsel, and instructed the jury to disregard such statement, and not to consider it for any purpose. The Supreme Court, however, held that such admonition and instruction did not cure the error, saying:

"We are satisfied that the unfavorable impression on the minds of the jury was not removed by the direction of the court to disregard the statement. Counsel knew when he made it that it was improper and reprehensible, and it is fair to presume that he would not have done so, had he not sup-

posed that some advantage to his client would thereby be gained. In such cases counsel who thus seeks to obtain that result takes upon himself the risk of losing what he hopes to secure. The following, among other cases, are authority for the reversal of the judgment for such conduct of counsel," citing cases.

In the instant case the trial court not only failed to clearly sustain the objection, or reprimand plaintiff's counsel for propounding the interrogatory in question, but it in no way admonished the jury at that time or subsequently that the interrogatory was improper, and that they should disregard the same for any purpose in deliberating upon their verdict. By failing to do so, I think the court was remiss in its duty, and its silence in that behalf emphasizes the error and prejudice suffered by defendant thereby. It must be apparent from what has just been said that the error committed was more aggravated than in the Coe case. The trial court had four opportunities (emanating from motions made by defendant's counsel) to discharge the jury and grant a continuance or new trial, the first of said motions being made while the jury were being impaneled, the second at the close of plaintiff's testimony, the third at the close of the trial, and the fourth in the hearing upon motion for new trial. In each instance the court denied the motion.

Vindicator Con. C. M. Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313, 10 Am. Cas. 1108, was another personal injury case, in which the veniremen, being examined upon their *voir dire,* were asked, over objection, if they were interested as agents or otherwise, or ever had been interestd, in The Frankfort Marine Accident & Plate Glass Insurance Company, no such issue being involved. The supreme court decided that the questions were proper, but adhered to and reaffirmed in no uncertain language, the doctrine laid down in the *Coe v. Van Why* case, saying:

"In the selection of jurors counsel are allowed considerable latitude not only for the purpose of ascertaining whether

or not grounds exist for challenges for cause, but, also, for the purpose of intelligently exercising peremptory challenges. Such questions are for the purpose of eliciting information from, and not imparting it to, the jurors. They are not barred, however, though directed to matters not in issue, provided it appears they are pertinent, are made in good faith, and for the purpose of excluding from the panel partial or prejudiced persons, or those who, by reason of interest in the result, would be incompetent. * * * In announcing this rule, we would not be understood as departing in the slightest degree from the salutary one announced in *Coe v. Van Why*, 33 Colo. 315, where it appeared that the statement of counsel in argument that the defendant was insured in an employers' liability company was made for the purpose of prejudicing and influencing the jury in favor of the plaintiff, and not to elicit information touching their competency to sit as jurors in the case."

In *Bartell v. Griffin*, 47 Colo. 569, 108 Pac. 171, the Supreme Court again emphasized the same doctrine. It appears that the trial court admitted, over objection, the following question and answer, viz:

"Q. If you should lose this case, Mr. Bartell, you would look to the bondsmen to settle with you for any damage you would sustain? A. I surely would."

This ruling the court was pressed as reversible error in the Supreme Court. The court said:

"There was no such issue in the case, and it was clearly error to overrule the objection made. * * * As was said in substance in *Coe v. Van Why*, 33 Colo. 315, in such case counsel who thus seeks to obtain an advantage for his client takes upon himself the risk of losing what he hopes to secure. Cases should be tried before a jury on competent testimony. The rights of litigants can only be preserved by adhering to this rule, and when a party to an action insists upon getting before a jury testimony which is incompetent and is intended to prejudice the rights of his adversary, he does so at his

peril, when, as in the case at bar, the testimony on the issues made by the pleadings is conflicting, or is of that character that different conclusions of fact might be deduced therefrom."

From the three decisions last cited it seems to be settled in this jurisdiction that in cases of this kind it is reversible error to propound to veniremen such questions as we are now considering, when the matter inquired of is not in issue, and it appears to be equally prejudicial whether the objectionable information imparted to the jury in evident bad faith reached it by interrogating veniremen, addressing the jury, or examining witnesses.

As I analyze the Coe case, it is decisive of this appeal in favor of appellant upon the first three assignments of error. That case is rendered more emphatic as authority upon the point by reason of its being cited and followed in the subsequent cases to which I have alluded. These cases are binding upon this court, and there is nothing left for it to do but follow the rule there laid down. The general situation, as to facts and circumstances in the instant case, as I understand it, appears to be not substantially different from that of the cases cited. We ought not to disregard the supreme authority. Our Supreme Court is far from being alone in the rule it has adopted. On the contrary it is supported by a multitude of authorities of high standing, as the following list will disclose: *Fuller Company v. Darragh,* 101 Ill. Ap. 664; *Hordern v. Salvation Army,* 124 App. Div. 674, 109 N. Y. Supp. 131; *Frahm v. Siegel-Cooper Co.,* 131 App. Div. 747, 116 N. Y. Supp. 90; *Manigold Co. v. Black River Traction Co.,* 81 App. Div. 381, 80 N. Y. Supp. 861; *Donnelly v. Younglove Lumber Co.,* 140 App. Div. 846, 125 N. Y. Supp. 689; *Sawyer v. Arnold Shoe Co.,* 90 Me. 369, 38 Atl. 333; *Emery Dry Goods Co. v. De Hart,* 130 Ill. App. 244; *Hollis v. U. S. Glass Co.,* 220 Pa. 49, 69 Atl. 55; *Kentucky W. Mfg. Co. v. Duganics,* (Ky.) 113 S. W. 128.

There appears to be an exception to the rule stated in the Coe case, which is that, notwithstanding the error germinated by counsel's misconduct, if there are no close questions of fact and the record affirmatively shows that the same was not prejudicial to defendant, such error will not work a reversal. In recognition of the exception the case of *Tanner v. Harper,* 32 Colo. 156, 75 Pac. 404, may be cited. That was a personal injury case in which plaintiff's counsel told the jury, while it was being impaneled, that a certain insurance company was the real party in interest, to which objection was made and sustained, the court telling the jury that they should disregard counsel's remark. The Supreme Court held that such statement was not reversible error, provided the record affirmatively showed that defendant was not prejudiced thereby, and proceeded to say that:

"The great weight of the testimony on the question of the negligence of defendants in constructing the track, and also on the subject of the alleged contributory negligence of the plaintiff, was overwhelmingly in favor of the latter. * * * So it appears from the record that there were no close questions of fact in the determination of which the jury might have been unconsciously influenced by the consideration of extraneous and improper matter,"

Comparing that case, as to issues of fact and proofs, with the one before us, I find the situation is entirely different. I do not think it can be fairly said in the case at bar that there are no close questions of fact involved. On the contrary, it seems that all the material issues being tried were sharply contested. There was sufficient evidence to have well sustained a verdict for defendant, had the jury so found. On the question of negligence and contributory negligence the testimony on the part of defendant shows that deceased was positively instructed by Webb, the manager of the mine, to not go into the incline at any time during working hours, and that for weeks prior to and at the time of the accident, printed or written notices to that effect were posted at the

portal of the incline, easily observable by all persons entering the same. On the other hand, plaintiff's testimony tends to show that no such notice was posted, and further that Webb told deceased to go into the incline at the time he did, and fix the roll. Webb denied that he ever gave deceased any such order. So upon these issues there was a close question of fact. As to the question of placing in the mine, and at the tipple, appliances and switches of a different character from those in use, we have the same situation—plaintiff's evidence showing that defendant had promised to do so, and defendant's evidence showing that no such promise was made. Here again was an issue that was a close question of fact. Again, defendant strenuously contended at the trial, and so contends on this appeal, that there is not sufficient evidence to show that Gobo failed to couple the car or failed to do his duty in seeing that the car did not escape as a wild car. There were other material issues of fact before the jury which were controverted. I think it clearly appears from the record that the evidence on all material issues of fact was in sharp conflict, and for that reason it is readily distinguishable from the Tanner case. It cannot be reasonably said here, as in that case, that:

"The great weight of the testimony on the question of the negligence of defendants * * * or the alleged contributory negligence of the plaintiff, was overwhelmingly in favor of the latter."

The most that can be fairly contended by either party is that the evidence was about equally balanced on these issues. The Tanner case preceded the Coe case, and the Supreme Court had the former before it when it announced the rule stated in the latter.

I think the judgment should be reversed and cause remanded.

[No. 3833.]

GIBSON, ET AL. V. DUPREE.

1. MASTER AND SERVANT—*Master's Liability for Acts of Servant.* A master is liable for the negligence of the servant occurring when the servant is acting within the scope of his employment. The purpose of the act in which the servant is engaged when the negligence occurs, rather than the method of its performance, is the test of the master's liability. One employed in a public garage was sent to obtain a battery which had been left with another establishment to be charged. Against the express prohibition of the master he took from the garage, for this mission, the auto car of a patron of the garage which was stored there, subject to the call of the owner. While returning with the charged battery he negligently ran upon and injured the plaintiff. *Held* that the servant was acting within the scope of his employment. (326-329)

2. —— *Deviation of the Servant About His Own Affairs.* The liability of the master is not affected by a slight deviation of the servant for his own ends, when about the business of the master. (332)

The servant, prior to the accident, and after he had obtained that for which he had been sent, had gone upon an errand of his own. The jury having found that the accident occurred while the servant was acting within the scope of his employment, the finding was approved. (332)

Appeal from Denver District Court. HON. HARRY C. RIDDLE, Judge.

MR. JOHN T. BOTTOM and MR. MILNOR E. GLEAVES for appellants.

MR. T. E. WATTERS and MR. PERCY S. MORRIS for appellee.

On rehearing, original opinion withdrawn, and the following substituted.

MORGAN, J.

Dupree, plaintiff below, while riding on a bicycle in the streets of Denver was struck by an automobile driven by defendant, Nagel, and kept, subject to the call of the owner, Evans, in the garage of the other two defendants, Gibson and Culver, employers of Nagel. Plaintiff had judgment for personal injuries for $500 against all three of the defendants, and they appealed. No point is made here as to Nagel's negligence and his liability, but it is contended that his employers

are not liable for the reason that he took the Evans car, and used it, without right or authority, and without the knowledge of his employers or the owner, and after being forbidden by his employers to take any car out of the garage for any purpose except upon the call or direction of the owner; and for the further reason that when the accident occurred he was not acting within the scope of his employment but had departed therefrom on business of his own.

Gibson and Culver, as partners, were the proprietors of a public garage where, as the principal part of their business, they kept automobiles for the owners, looked after them while in the garage and sent them to the owners and sent after them, at the owners' request. Nagel was employed in the garage, and as part of his duties he took automobiles to the owners, and brought them back to the garage, and had batteries charged, belonging to automobiles kept in the garage. The accident occurred while he was returning in the Evans automobile from the Carstarphen Electric Company's place of business with a battery, to which place he had taken it to have it charged. After obtaining the battery he drove the automobile to a supply house, and there purchased a pair of pliers for his own use, and was on his way back to the place of his employment when the accident occurred. The evidence discloses that he took the automobile for his own convenience because the battery was heavy and he did not want to walk and carry it, although he was supposed to walk, and that he had no authority to take it out on this occasion or to use it, for such purpose, at any time.

The assignments of error will be disposed of under the three following questions, although the first actually includes the other two: 1. Was the servant within the scope of his employment and about his masters' business when the accident occurred? 2. Did the lower court err in excluding the evidence, offered by the employers, to the effect that they told the servant that he was not to take out of the garage any automobile without their order or the request of the owner?

3. Did the servant's deviation from the direct route back to the garage, separately, or coupled with his disobedience in using the automobile, dissolve, or suspend the relationship of master and servant at the time of the accident, or prevent him from being, nevertheless, about his masters' business?

First. Apart from his driving the car to the supply house where he bought the pair of pliers, which will be referred to later, the facts disclose, and the jury so found, that he was about his masters' business and within the scope of his employment in going after the battery, and in returning with it, although he was using a means of carrying it, suggested and carried out by his own will and for his personal convenience, and contrary to the directions of his employers, and without their consent or the consent of the owner. And as the accident occurred when he was so returning, his employers are liable for the tort committed. "This rule is obviously founded upon the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another." *Farwell v. Boston, etc., R.*, 4 Metc. (Mass.) 49. Furthermore, "a master is answerable because the servant is about the master's business, and it is, on the whole, better that the master should suffer for defaults in the conduct of the business, than that innocent third parties should bear the losses that such defaults cast upon them." Huffcut's Agency (2d Ed.), p. 194, citing Pollock on Torts, (5th Ed), pp. 72, 74. It is stated in 26 *Cyc.* 1533, that the master is liable for the negligence of the servant if such negligence occurred "within the scope of the employment." And in the case of *Phila., etc., R. R. Co. v. Derby,* 14 How. 468, 14 L. Ed. 502, it is said by the United States Supreme Court that:

"The rule of *'respondeat superior,'* or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable;

and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. (See Story on Agency, sec. 452; Smith on Master and Servant, 152)"

It is also said, in 15 *Cyc.* 1534, that "the purpose of the act rather than its method of performance is the test of the scope of employment." It is said also in the case of *Pittsburg, etc., R. R. Co. v. Kirk,* 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675, that:

"Where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means, reasonably intended and directed to the end, which resulted in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means; and this, too, even though the means employed were outside of his authority, and against the express orders of the master." Citing 2 Thomp. Neg. 889; Wood Mast. & Ser., 593, 4.

A master is liable for the tort of his servant committed in disobedience of his master's orders, provided such disobedience does not carry the servant entirely outside the scope of his employment. For example, if the disobedience has relation merely to the manner in which an act, incident to the authorized functions of the servant, is performed.

6 Labatt's Mast. & Ser. (2nd Ed.) 6894, citing *Philadelphia, etc., R. R. Co. v. Derby, supra.*

It is plain from these authorities that, if the accident occurred while the employe was engaged in performing one of the duties of his employment, it would make no difference that he used the forbidden means that he did use to perform such duty, so far as the plaintiff's rights are concerned, provided his employers placed him where he could, with their implied authority, by his mere disobedience, use the forbidden means. There can be no doubt that Nagel was engaged in his masters' business and within the scope of his employment,

in going after the battery and bringing it back to their place of business, and the fact that he used the automobile in the performance of such duty did not carry him outside of the scope of his employment, although the use of such means was without the authority and consent of his masters and of the owner, and against his employers' instructions; the relationship of master and servant was not thereby suspended or extinguished; this is the test, if he was about his masters' business, with possible exceptions not necessary to be discussed here. Such disobedience in using the automobile for such purpose has relation merely to the manner in which the act (going after and returning with the battery) was performed. The masters are liable for injury caused by the disobedience of the servant in so using the automobile. It is clear the employers would have been liable if the accident had occurred while the servant was taking the car to the owner, or bringing it back, and the only difference is his disobedience, which does not relieve his employers. See authorities, *infra.*

The many modifying circumstances, involved in a discussion of this principle, have led to some statements in the opinions specifically applicable to each particular case, not applicable to all, but, when critically examined, there is but little conflict of authority. There are cases where the instrumentality or means used by the servant did not belong to, or were not within the partial or entire control of the master, such as *Goodman v. Kennell,* 3 Car. & P., 167; *Wilson v. Penn. R. Co.,* 63 N. J. L. 385, 43 Atl. 894; *Stretton v. Toronto,* 13 Ont. 139; which seem to afford an exception to the general rule—that the master is liable for the tort of the servant committed while engaged in his master's business and within the scope of his employment. Some of these cases are relied upon by the appellants, on the assumed fact that the employers herein did not own, and had no control over the automobile, and that the employers themselves had no authority to take it out of the garage. But this automobile was in their charge with authority to take it out on the owner's request and this

gave Nagel authority from his employers to take it out of the garage and run it, although only on request of the owner, as a trusted and competent driver thereof, and the mere fact that he took it out and used it as he did about his masters' business did not dissolve the relationship of master and servant, or, by such disobedience, relieve the employers from liability to the plaintiff. There is nothing in the facts in this case to take it out of the general rule, or to place it among any of the possible exceptions heretofore referred to; or to cause it to be affected by the result reached in *Andrews v. Green,* 62 N. H. 436; *Walton v. N. Y. Cent. Sleeping Car Co.,* 139 Mass. 566, 2 N. E. 101; or *Palmer v. St. Albans,* 60 Vt. 427, 13 Atl. 569, 6 Am. St. 125. The employers were, in this instance, bailees of the automobile, and it was within their control, subject, of course, to the contract of bailment, and, by the employment, it was placed by them under the same control of their employe, and his use of it, simply by his disobedience, was, under the law, the employers' use, both as to the plaintiff and as to the owner, so long as he used it about his employers' business, and within the scope of his employment.

Second. It is contended that the lower court committed reversible error in excluding the testimony of all three of the defendants, which tended to prove in positive and express terms that Nagel had been instructed not to take out of the garage any car, and had been forbidden to do so, without an order from his employers or by the direction of the owner. Such testimony was immaterial, as such fact would have been no defense, as shown by the following, together with the foregoing authorities: In *Cosgrove v. Ogden,* 49 N. Y. 255, 7, 10 Am. Rep. 361, it is said: "The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do." In *Burnett v. Oechsner,* 92 Tex. 598, 50 S. W. 562, 71 Am. St. 880, it is said: "For the mode in which the servant performs

the duty he is engaged to perform, if wrongful and to the injury of another, the master is liable although he may have expressly forbidden the particular act." Again in the case of *Powell v. Deveney,* 3 Cush. (Mass.) 300: "The servant, being about the business of his master, the master must be responsible for his acts and cannot exempt himself by any order he may give the servant." In the case of *McClung v. Dearborne,* 134 Penn. St. 396, 406, 7, 19 Atl. 698, 8 L. R. A. 204, 19 Am. St. 708, it is said: "It was the master's duty not only to give such orders but to see that they were obeyed. It will be seen, therefore, that it was the character of the employment, and not the private instructions given by the master to the servant, that must determine the measure of his liability in any given case."

Judge Cooley says (2 Cooley on Torts, 3rd Ed., 1028, 1029):

"It is immaterial to the master's responsibility that the servant at the time was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. In other words, it is not sufficient for the master to give proper directions; he must also see that they are obeyed. * * * That they (the masters) trusted a servant who has ventured to disobey instructions is their misfortune, but it ought not also to be the misfortune of others who had no voice in his selection, and who had no concern in the question who should manage the company's business beyond the common concern of all the public that it should not be managed to their injury. * * *

The disobedience is culpable in the servant, and the master, having taken those precautions which, if observed, would have prevented the injury, is free from fault, but, nevertheless, his duty to his neighbor to so use his own as not to

injure the neighbor has failed in performance, and the law leaves him to bear the consequences."

This testimony was offered presumably, to show that Nagel was not engaged in his masters' business, and that the accident did not occur in the course of his employment, but its only use and force would be to show that he used an unauthorized and forbidden means in performing his masters' business; and, as the courts have held that the use of an unauthorized means in doing an authorized act does not relieve the master, the evidence was immaterial. See, also, *26 Cyc.* 1533; 20 Am. Eng. Enc. Law, 167; Wharton's Law of Neg. (1874), sec. 171.

Third. The next question to determine is involved in the contention of appellants that Nagel departed, momentarily, from the course of his employment and was at liberty, on an errand of his own, when he drove the car to the supply house to buy a pair of pliers for his own use, and that if he had not so departed the accident would not have occurred, although he had obtained the pliers and was on his way back to his place of employment, carrying the battery, when the accident occurred.

There is authority for holding that, even if the servant has departed from his master's business on business of his own, if, after conducting his private business, he then starts back to his place of employment, on his way back he is held to have resumed his master's business. *26 Cyc.* 1536, and cases cited.

The question to be determined here, however, is the same as in the foregoing discussion, that is, was he still about his masters' business, and within the scope of his employment? The court might well have instructed the jury that, if they believed he was about his masters' business, and within the scope of his employment, when he was returning with the battery in the car, by way of the supply house, and on his way from the supply house with the battery, and the pliers, to the place of his employment when the accident occurred,

they should find for the plaintiff; or, in the negative, if they believed the relationship of master and servant did not exist when he was going by way of the supply house and returning therefrom, they should find for the defendants, Gibson and Culver. No such instruction was requested, however, and no particular instruction of this character was given, and no objection was interposed to the general instruction that the accident must have occurred while he was acting within the scope of his employment, to render the defendants, Gibson and Culver, liable. Under these circumstances, it must be concluded that the jury found, under the general instruction, that the accident occurred while the servant was acting within the scope of his employment. That the jury did consider this deviation, going after the pliers, is obvious from the close questioning and cross-questioning of Nagel on this particular incident. The instructions given were sufficiently clear to justify argument before the jury, which might have been taken advantage of by counsel, and, for aught this court knows, was taken advantage of.

The law is well settled that one may be in the service of another and yet at times attend to business or pleasure for himself, and acts done while the servant is at liberty cannot render the master liable; but, if the servant while about his master's business, makes a slight deviation for ends of his own the master remains liable, as, where the servant drives out of the most direct route for personal ends, or where a pilot diverges from a direct course for ends not connected with a master's business. *Joel v. Morrison,* 6 C. & P. 501; *Sleath v. Wilson,* 9 C. & P. 607; *Mulvehill v. Bates,* 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796; *Quinn v. Power,* 87 N. Y. 535, 41 Am. Rep. 392; *Ritchie v. Waller,* 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. 361.

In the case last cited the court said:

"But if the servant, while about his master's business, makes a slight deviation for ends of his own, the master re-

mains liable, as, where the servant drives out of the most direct route for personal ends, or where a pilot diverges from the direct course for ends not connected with his master's business.

In such cases it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the court may, and often will, as a matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions."

In the cases of *Quinn v. Power, supra,* and *Ritchie v. Waller, supra,* it is held that, when the act is so closely connected with the master's affairs that, though the servant may derive some benefit from it, it may, nevertheless, fairly be regarded as within the course of the employment, the master will be liable. Certainly the facts of this case place it, at least, in the zone, between the two extremes, over which the domininion of the jury should prevail; and, as it cannot be said that the evidence is such that the court was not justified in submitting this question to the jury and, as the lower court did so submit it, although in general terms, and, as the jury determined the matter in favor of the plaintiff, the judgment entered upon such verdict will not be disturbed.

The other assignments of error, and especially the one relating to the admission in evidence of the city ordinance, have been duly considered and resolved against the appellants.

Judgment affirmed.

[No. 3835.]

MOORE, ET AL. V. KLINE.

1. PLEADING—*Judgment on the Pleadings,* should be granted only where this must be the ultimate result, whatever may be the findings upon the facts. (336)

Defendants had leased to plaintiff a store building then in course of construction, and executed to him a writing substantially in these words: "We bind ourselves in the sum of $1,500.00 that the store leased by us to H. B. Kline will be completed on or before, etc., and that said Kline will be given possession thereof as soon as completed; this guarantee to be void if possession is given within the time specified, otherwise in full force, and said sum of $1,500.00 is to be paid to said Kline." Judgment on the pleadings in favor of plaintiff. No reason moving the court to such judgment appearing in the record, ***held*** that it must have been given upon the assumption that the moneys set down in the writing constituted, in law, liquidated damages, and that as this assumption was inadmissible, the judgment was erroneous. (337, 338)

2. CONTRACTS—*Construction—Penalty or Liquidated Damages.* If a writing assumes the form of a bond, with a condition that it shall be void on the performance or non-performance of some collateral thing, the presumption is that it is intended as a mere security, and not as a liquidation of damages. Very strong evidence is required to overthrow this presumption. (337)

So, in general, a sum of money in gross to be paid for the non-performance of an agreement is considered a penalty. One contending that such sum was intended as liquidated damages has the burden of showing that this was the intention of the contracting parties. (337)

The question is to be determined by considering the nature of the contract, the situation of the parties and the attending circumstances; not merely upon the language used. (338)

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

MR. JOHN T. BOTTOM and MR. MILNOR E. GLEAVES for appellants.

MESSRS. O'DONNELL, GRAHAM & O'DONNELL for appellee.

BELL, J.

It seems that, on or about the 4th day of April, 1910, the appellants Moore & Greaves held a lease on Lots 10, 11 and 12 in Block 108 of East Denver, Colo., with the buildings thereon, subject to a lease on a storeroom in said buildings known as number 1616 Curtis street, made to one Joseph Holzman, deceased. Appellants caused plans and specifications to be made for the erection of a new building on said lots, and, it would seem from the pleadings, both parties hereto were mutually interested in the removal of the old buildings from said premises, and the erection of a new one thereon, to be known as the Princess Theater Building. Appellee desired to occupy the new storeroom, to be known as 1616 Curtis street, when the same should be constructed, and, in pursuance of an arrangement made with appellants, agreed to, and did, secure an assignment of said Holzman lease, held by his legal representatives, and further agreed with appellants that he would pay to said estate the necessary price of $1,500 for its interest in said lease, store rights and business, and consent to the removal of the old buildings from said lots, and the erection of the new one thereon, upon condition that he should have a lease to said new storeroom for a period of five years, at a fixed monthly rental, together with a right of renewal for a like period, and upon the further condition that said new storeroom should be completed and possession thereof delivered to him on or before the 15th day of July, 1910. To guarantee the completion of said new storeroom and possession thereof to the appellee within the time agreed upon, appellants executed and delivered to him their written obligation in words and figures as follows:

"We, and each of us, hereby bind ourselves in the sum of fifteen hundred dollars and hereby guarantee that the storeroom leased by Moore and Greaves to H. B. Kline will be completed on or before July 15, 1910, and that the said H. B. Kline will be given possession thereof as soon as completed; this guarantee to be void if possession is given within the time specified; otherwise to remain in full force and effect,

and said sum of fifteen hundred dollars is to be paid to the said H. B. Kline.

GEORGE H. GREAVES,
GEORGE C. MOORE,
By G. H. GREAVES,
Attorney in Fact.
A. P. MACKEY."

Said storeroom was not completed nor possession thereof delivered to appellee on or before the 15th day of July, 1910, and, upon said last mentioned day, he demanded payment of the $1,500 stated in the written obligation. Appellants allege in their answer that he demanded, not only the payment of the gross penal sum, but also possession of said storeroom at the earliest day possible, and that they were then willing, and offered, to pay him the amount demanded, if he would surrender all claims to the possession of said storeroom, but that he refused to accept said sum in full satisfaction of his claims, and, prior to the time when said storeroom was completed, entered a suit in the district court within and for the city and county of Denver, whereby he wrongfully sought and wrongfully obtained possession thereof. A replication was filed to the answer, and plaintiff, appellee herein, interposed a verbal motion for judgment on the pleadings, which was granted by the trial court, and judgment was entered in his favor for the sum of $1,592.73, the amount stated in the written obligation and, presumably, the interest thereon as prayed for in the complaint.

The abstract is silent as to the cause urged or determined as a justification for a judgment on the pleadings. Judgments on the pleadings should be restricted to such cases as would ultimately result in a judgment in favor of the moving party regardless of what the findings might be on the facts upon which issue is joined: *The People ex rel. v. Brown*, 23 Colo. 425, 48 Pac. 661; *Mills, et al., v. Hart, et al.*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. 241.

Upon scrutinizing the record of the pleadings, we are unable to find any reason that should have moved the trial judge to render judgment thereon. He must have determined, as a basis for the judgment, that the amount set forth in the instrument constituted, in law, liquidated damages. There is nothing about the transaction of the parties as described in the pleadings that justified the court in such a conclusion. The instrument makes no pretense of embodying the terms of the primary contract for the tenancy, but it is, in its nature, collateral thereto and intended to enforce the primary contract to furnish the appellee with a new place of business within the time and in the manner agreed upon as therein set forth. It is in the general form of a penal bond, though not artistically constructed, nor entirely couched in the usual language embodied in such bonds; but the inference is strong that the object sought by it was to coerce appellants to make it a point of every effort to complete the storeroom and deliver possession thereof to the appelle on or before July 15th, 1910. The general rule of law is that, if an agreement assumes the form of a bond, with condition that it shall be void upon the performance or non-performance of an act, the *prima facie* presumption is that the sum of money mentioned therein is intended merely as a security and not as liquidated damages, and this presumption will stand until controlled by very strong considerations. In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not be considered as liquidated damages, and it will be incumbent on the party who claims it as such to show that it was so considered by the contracting parties: *Davis v. Gillett,* 52 N. H. 126, 129-30; *Tayloe v. Sandiford,* 7 Wheat. 13, 5 L. Ed. 384; 3rd Parsons on Contracts, 9th Ed., pp. 171, 172.

Page on Contracts, Vol. II, Sec. 1167, defines a contract for a penalty and one for liquidated damages as follows:

"A contract for a penalty is an agreement to pay a stipulated sum in case of default, intended to coerce performance, to punish default, or to secure payment of the actual damages. A contract for liquidated damages is a contract by which the parties in advance of breach fix the amount of damages which will result therefrom, and agreed upon its payment."

Whether a sum named in a contract is to be regarded as liquidated damages or as a penalty depends upon the intention of the parties as it appears from the nature of the contract, the situation of the parties and the attending circumstances, and not merely upon the language used: *Carson v. Arvantes*, 10 Colo. App. 382, 385, 386, 50 Pac. 1080; *Sanford v. First Nat. Bank*, 94 Iowa 680, 63 N. W. 459; 19 Am. & Eng. Encyc. of Law, p. 396; 13 Cyc. 92, 93; Page on Contracts, Vol. 2, §§ 1172, 1173. And in case of doubt, whether a sum fixed by contract is a penalty or liquidated damages, the courts lean toward the former construction, because where parties agree upon the damages to be paid for a breach of contract, whatever name they give to it, they do substantially the same thing which is done by a bond with a penalty, and there is no more reason why the courts should regard the agreement, if it opposes reason and justice, in the one case than in the other. *Amanda G. M. Co. v. People's M. Co.*, 28 Colo. 251, 64 Pac. 218; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; 3 Parsons on Contracts (9th Ed.), pp. 171, 172; Page on Contracts, Vol. 2, § 1173.

If, upon a trial on the merits, it should prove true, as alleged in the answer, that, at the time judgment on the pleadings was rendered, appellee had obtained possession of the premises in question and was enjoying them for the purposes contracted for, it would hardly be conceivable in law or equity why such a judgment as rendered should stand

with the material allegations of the complaint denied and without any evidence whatever as to the actual damages sustained.

The judgment of the trial court is, therefore, reversed, and the case remanded for trial in harmony with this opinion.

Reversed and remanded.

[No. 4005.]

WORKMAN, ET AL. v. STEPHENSON.

1. STATUTE OF FRAUDS—*Easement by Parol.* As a general rule a parol agreement will not be received to establish an easement where the statute of frauds is pleaded. (341, 342)

2. LICENSE—*Parol—Revocation.* A parol license to occupy the lands of the licensor for a way, or the like, is revocable until acted upon by the licensee. (342)

If the owner fence or obstruct the way this is a revocation of the license. (342)

3. —— *Payment of Consideration,* is not a controlling element in the question whether a license is revocable, though important. Generally there must be other elements. (342)

4. —— *Terms of the License Must Be Certain.* An agreement for a way over particular lands, nothing being said as to its width, is too uncertain to confer a right. (343)

5. EQUITY—*Maxims.* Equity will not decree a useless thing to be done, e. g., to require the mother to do that which, as the natural guardian of her minor children it may be her duty to prevent. (343, 344)

Error to the Rio Grande District Court. HON CHAS. C. HOLBROOK, Judge.

MR. JAMES P. VEERKAMP for plaintiffs in error.

MR. JESSE STEPHENSON, *Pro Se,* for defendant in error.

KING, J., delivered the opinion of the court.

For convenience, the parties hereto will be called plaintiff and defendant, as in the trial court. Jesse Stephenson, defendant in error, was plaintiff, and Melinda J. Workman defendant. Mrs. Workman was the widow of Travis D. Workman, and she and her two minor children, as heirs of

said Travis D. Workman, were the owners of the north half of the northwest quarter of section 7, township 38 north, range 9 E. N. M. M., together with other lands lying east of the tract described. Plaintiff was the owner of a tract of land, the northwest corner of which was coincident with the southeast corner of the tract hereinbefore described. Plaintiff alleged that in the fall of 1911 he entered into an oral contract with defendant whereby he was to furnish the materials for the construction of a party-line fence between his land and the land of the Workmans lying east of the tract described; that defendant was to construct the fence, after which it should be for the common use of the owners of said lands; that in addition to constructing the fence, the defendant "was to give this plaintiff an easement along the south side of the north half of said northwest quarter of section seven (7), and on the corner of the said northwest quarter of the northeast quarter of said section * * * which said easement was to be for the purpose of constructing, maintaining and operating a ditch for the purpose of irrigating the lands owned by plaintiff, and also for the purpose of being used as a drive way, along the south side of said land, from the lands owned by plaintiff to the west side of said section seven (7)." The complaint further alleges that the plaintiff performed his part of the contract; that the defendant constructed the fence as provided in the agreement, but had fenced the right of way, and at all times refused to permit the plaintiff to occupy the same or to use the land as a driveway, and threatened to maintain the fence and deny plaintiff's right to use the way in the future. The allegations of the complaint as to the way were denied, and the plea of the statute of frauds interposed.

Upon conflicting evidence, the court made a finding that there was an oral agreement between plaintiff and Mrs. Workman, whereby he was to have a driveway along the south side of the land herein described, "and that subsequent to the granting of said oral license, the said right of way was paid for by the plaintiff, and that the said right of way re-

mained open and was used by the plaintiff and others until the 13th day of May, 1912;" that thereafter the defendants unlawfully erected fences upon the right of way. Judgment was entered, enjoining defendants from constructing or maintaining any fences or other obstructions upon said right of way, and included a mandatory order requiring them to remove the fences already constructed. Defendant admitted that she told the plaintiff he might build a small ditch upon the land belonging to defendant and her children, to carry water to plaintiff's lands; denied that she agreed to give him a permanent right of way for road or driveway; but admitted that she told him he could so use it as long as she left it open for her own use, it appearing that it was then unenclosed. The court's finding, that the parol license had been paid for, was predicated solely upon the plaintiff's testimony that the consideration for such license was included in the offer of plaintiff to furnish the materials for the fence. The complaint does not allege, and there is no evidence to support the finding of the court, that the alleged license was ever exercised by plaintiff, either by the construction of the ditch or the use of the way. On the contrary, plaintiff's own evidence shows that he made a survey for a ditch and found that he did not need to use defendant's lands therefor, and built his ditch elsewhere. There is not a scintilla of evidence to show that between the date of the agreement and the beginning of the suit, plaintiff had used defendant's land for a way. There is some evidence tending to show that other persons, not parties to the alleged agreement or license, were trespassing on defendant's land, by using it as a driveway, for which reason she fenced it; but plaintiff's case is in no manner strengthened by that trespass.

Under the condition of the pleadings and evidence, the judgment should have been for the defendant. (1) If the interest claimed by plaintiff in the land of the defendant and her children is to be regarded as an easement, it is an interest in real estate claimed to have been created by express agree-

ment, and is an estate which, as a general rule, cannot be created or proven by parol when the statute of frauds is pleaded in bar—*Stewart v. Stevens,* 10 Colo. 440, 446, 15 Pac. 786; *Ward v. Farwell,* 6 Colo. 66; Jones on Easements, §§ 63-204, and cases cited. Nothing in this case takes it out of the general rule. (2) If the interest claimed by plaintiff was a parol license, as the decree finds it was, it was revocable until acted upon by the licensee, and the act of Mrs. Workman in closing the land to plaintiff's use was a revocation. Plaintiff insists that the parol license became irrevocable because he paid for the license by furnishing materials for the fence, and the court seems to have so held. Payment of consideration is often an important, but is not a controlling, element in determining whether a parol license is thereafter revocable, but generally there must be other elements. In the instant case it was necessary also to allege and prove the use of the land said to have been licensed—*Duinneen v. Rich,* 22 Wis. 550; *Thoemke v. Fielder,* 91 Wis. 386, 64 N. W. 1030; *Johnson v. Skillman,* 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192; *Tanner v. Volentine,* 75 Ill. 624; *White v. Manhattan R. Co.,* 139 N. Y. 19, 34 N. E. 87; *Long v. Mayberry,* 96 Tenn. 378, 36 S. W. 1040. It is true that the common law rule in regard to parol licenses, which held them revocable, has been modified in this state, particularly with regard to irrigation ditches—*DeGraffenried v. Savage,* 9 Colo. App. 131, 47 Pac. 902; *Schilling v. Rominger,* 4 Colo. 100, 105; *Tynon v. Despain,* 22 Colo. 240, 246, 43 Pac. 1039; *McLure v. Koen,* 25 Colo. 284, 287, 53 Pac. 1038; *Arthur Irrig. Co. v. Strayer,* 50 Colo. 371, 375, 115 Pac. 724. These cases are cited by plaintiff, but none of them supports the judgment. In *DeGraffenried v. Savage, supra,* the claimant of the easement had built an irrigation ditch over certain land, with the knowledge and consent of the owner, and had used it for two years. No consideration had been paid. The court said that in this arid country, a right of way for irrigation ditches is granted *ex necessitate,* and held that "in cases of this kind, license to

enter, *after entry and construction of a ditch,* operates as a grant, and such grant is presumed and implied." In *Schilling v. Rominger, supra,* in which an irrigation ditch was under consideration, the court sustained the easement upon the holding that the agreement was wholly executed, and there had been an uninterrupted user thereof for two years. In *Tynon v. Despain, supra,* there had been an uninterrupted user, with the knowledge of the owners of the land, for many years, and the court said that if the easement claimed rested upon a parol license, it might be sustained on the principle that the license was not revocable so far as it had been executed. In *McLure v. Koen, supra,* the court said, "It is well settled in this jurisdiction that although an oral contract relating to realty is within the statute, where a consideration has passed, and it has been fully performed by both parties, and the *possession taken in pursuance thereof,* the bar of the statute is removed, and equity will enforce the right thus acquired." That case and the case of *Arthur Irrig. Co. v. Strayer, supra,* involved the right of way for irrigation ditches. The easement was sustained, because of the user for several years. (3) The terms of the alleged agreement, as disclosed by the evidence, were too indefinite, and uncertain as to the extent and character of the privilege, to sustain a judgment. There was neither allegation nor proof as to the location of the way, except the indefinite statement that it was to be "along the south line"—no width agreed upon—nor talked of in fact—nothing of the definiteness and certainty usually found in and necessary to the creation of interests in real estate.

There is another matter which we think worthy of consideration: the decree sought to limit its effect to the defendant only, by reciting that the injunction should not be construed to affect the rights of the minor children, who were owners of an undivided half interest in the land; but it is evident that if the mother of the minors be compelled to remove the fences, the interests of the minors will be subjected to the easement, unless they shall institute some proceeding

to prevent its being so used. We think the mother, as the natural guardian of her children, has the right, and it may be her duty, to protect their interests during their minority by fencing against trespassers, and for that reason she could do in her representative capacity what she is by the court enjoined from doing in her own interest. Equity will not order a useless thing to be done.

The judgment is reversed and cause remanded, with instructions to dismiss the action at the costs of the plaintiff.

Reversed and remanded.

[No. 4051.]

FLYNN, ET AL. v. CASPER.

1. HABEAS CORPUS ACT—*Construed.* The habeas corpus act (Rev. Stat. c. LXI.) was enacted peculiarly, if not solely, to provide for the discharge of those illegally detained upon a criminal accusation, or in a civil action for tortious misconduct, and does not take away the common law writ where the restraint complained of is a mere incident to the right of custody of the person restrained, and the future disposition of such person is to be adjudicated, e. g. where the parent seeks the custody of his infant child. (345)

2. —— *Jurisdiction of County Court.* Habeas corpus by a parent, demanding the custody of his infant child, is, under the statute (Rev. Stat. sec. 1526) within the jurisdiction of the County Court. (346, 347)

3. —— *Appeal.* An appeal lies from the County Court to the District Court. (Rev. Stat., sec. 1536). (347)

Error to Prowers District Court. HON. A. WATSON MCHENDRIE, Judge,

MR. GRANBY HILLYER for plaintiffs in error.

MESSRS. MERRILL & MCCARTY for defendant in error.

KING, J., delivered the opinion of the court.

This is a habeas corpus proceeding commenced in the County Court by John M. Casper, defendant in error here, against James H. Flynn and Rose Flynn, plaintiffs in error, to obtain the custody of his infant daughter, Nina Dale Cas-

per. On trial in the County Court, judgment was rendered in favor of the defendants, whereupon an appeal was taken to the District Court. Upon trial *de novo,* the District Court awarded the custody of the infant to its father.

The only question discussed in the briefs, and necessary for determination here, is whether, by appeal from the County Court, the District Court acquired jurisdiction to try and determine the case. Plaintiffs in error contend that no right of appeal is granted by the habeas corpus statutes, and that such right is neither expressly nor by clear implication conferred by the general statutes governing the jurisdiction of County Courts and appeals therefrom. The general statutes provide that County Courts of the several counties of this state shall have concurrent jurisdiction with the District Courts in all civil actions, suits and proceedings whatsoever, except as otherwise provided—Rev. Stats. 1908, § 1526, Mills' Ann. Stats. § 1650—and that appeals may be taken to the District Court of the same county from all final judgments and decrees of the County Court in civil actions, except judgments by confession—Rev. Stats. 1908, § 1536, Mills' Ann. Stats. § 1660. If this proceeding and the right of appeal under consideration were limited to and controlled entirely by the provisions of the chapter in relation to habeas corpus, the contention of plaintiffs in error might present greater difficulties, as that chapter seems to provide a special statutory procedure for matters coming only within its provisions; but it is clear that the statute was enacted peculiarly, if not solely, with respect to proceedings for discharging persons from illegal imprisonment for "criminal or supposed criminal matters," and from illegal imprisonment in civil suits involving quasi-criminal, or tortious elements, in satisfaction of which imprisonment may be awarded. It does not expressly, nor, do we think, impliedly, take away the common law writ when used in civil matters such as this where release from the restraint complained of is incident to the main issue of the right to the custody of the person said to be under

restraint, as between the petitioner and the respondent—in other words, where future disposition, as well as release from restraint, is to be decided. At common law, jurisdiction over the writ was exercised by courts of chancery, as well as of King's Bench and Common Pleas—Hurd on Habeas Corpus, *147, 457. And when the writ was granted on petition of a parent for the purpose of determining the right to the custody of his infant child, either court, having acquired jurisdiction of the infant by virtue of the writ, often proceeded as a court in chancery to determine not only the legal right of the father to its custody, but also whether the interest and welfare of the child would be promoted by taking it from the custody of the respondent and restoring it to that of the father, the welfare of the child being the primary and controlling question for the guidance of the court. When invoked for the purposes named, the action is regarded as a civil action or proceeding. In this state, the County Court has general jurisdiction of all civil matters, both in law and in equity, except as expressly limited—*Sievers v. County Court*, 11 Colo. App. 147, 149, 52 Pac. 634; *Arnett v. Berg*, 18 Colo. App. 341, 71 Pac. 636.

In this case, the petition for the writ was as full, and stated as amply the reasons for demanding and retaining the custody of the child, as if it had been a complaint in any other civil suit at law or in equity, and the answer and reply were of the same nature. Although the habeas corpus writ was used to effectuate its purpose, we regard this suit as clearly within the contemplation of the general provisions of the statute conferring jurisdiction upon County Courts in civil actions and proceedings, and the right of appeal to the District Court from final decrees and judgments of the County Court therein (except as expressly limited by the habeas corpus act). It is true that the special chapter relative to habeas corpus makes no provision for appeal to the District Court from a judgment or order of the County Court, but the same is true as to the right of appeal from or writ

of error to the District Court; so that if the provisions of that chapter are controlling upon the right of appeal or to writ of error, they are as conclusive against that right as to judgments of the District Court as to those of the County Court; and that question, so far as it pertains to appeals from the District Court, has been determined adversely to the contention of plaintiffs in error in *McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406, and *People ex rel. Green v. Court of Appeals*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105. In the last case cited the court said:

"Counsel for petitioner contend that no review of such judgment can be had on appeal or error unless the same is expressly provided for by statute. Whatever may be the rule in this regard applicable to the usual judgment in *habeas corpus* discharging a party from illegal imprisonment, we think that in a case where the controversy involves the right to the custody of an infant, although the writ of *habeas corpus* is used to determine that right, it is nevertheless a civil suit, and the judgment rendered being a final adjudication in regard to such custody, it is clearly reviewable by the court of appeals, under the statute creating that court."

We think the reason for the rule, adopted in the cases cited, applies with equal force to the instant case.

The judgment is affirmed.

Affirmed.

[No. 4054.]

LAMONT V. REYNOLDS, ET AL.

1. PLEADINGS—*Construed.* Complaint demanding specific performance of a contract for the lease and sale of a mine by Lamont and the other defendant, to plaintiffs and Lamont, alleged that "the relations between plaintiffs and Lamont became strained, in consequence of differences as to the proper method of working, and at, etc., the said Lamont ceased to work at said mine." *Held* to import that Lamont withdrew from the venture and surrendered all interest as co-lessee. (350)

2. MINING PARTNERSHIP—*When It Exists.* Three obtained a lease and bond of mining property, and having assumed possession agreed that all

three "should and would work and operate the same in pursuance of said lease." The lease contained no provision as to the amount or character of the work to be done. *Held* that the agreement of the parties constituted them a mining partnership in the narrowest and most technical sense. (351, 352)

3. —— *Right of Partner to Withdraw.* In the absence of an agreement to the contrary, a member of a mining partnership may withdraw at any time. (353)

4. —— *Effect of Partner's Withdrawal.* Where one partner ceases to work, and quits the premises, the partnership is terminated as to him, and, without some further agreement, he is not liable for the expense of further operations upon the property, nor entitled to any share of the profits thereof. (353)

5. CONTRACTS—*Construed.* Pritchard and Lamont, being equal owners of certain mining premises, executed a penal bond to Lamont and two others, conditioned for the conveyance of said properties, on the payment of a sum certain at a specified date, the obligees "to be placed in full possession to mine, remove and sell ore therefrom."

Lamont and the other obligees formed a mining partnership, and for some time operated the property jointly. Lamont retiring from the partnership, and the other obligees having made due tender of the purchase money, Lamont was decreed to convey to them the undivided one-sixth of the properties. (354)

Error to Clear Creek District Court. HON. CHARLES MCCALL, Judge.

MR. HUGH O. NEVILLE, MR. W. H. C. TAYLOR for plaintiff in error.

MESSRS. MCCALL & MCCALL for defendants in error.

HURLBUT, J., rendered the opinion of the court.

On July 27, 1909, plaintiffs (defendants in error) instituted this action against E. W. Pritchard and one Fred Lamont, defendants, praying for the specific performance of a contract. For convenience we will herein refer to the parties as plaintiffs and defendants, as they appear in the original complaint.

A supplemental complaint was filed, from which it appears that on August 1, 1906, a written contract, designated as "Title Bond and Lease of Mining Property," was entered into between plaintiffs on one part and defendants on the other, by the terms of which defendants agreed to sell certain

mining premises to plaintiffs and Lamont for the sum of $5,000, and execute deed therefor at any time on or before the first day of August, 1909, upon payment to them, or deposit to their credit in the Colorado National Bank of Denver, of the sum of $5,000. The lease gave plaintiffs and Lamont right to full possession of the mining claims, and to mine the same and remove therefrom the ores, upon an agreed royalty of ten per cent. of the net value thereof. It further appears from the amended complaint that on or about August 1, 1906, plaintiffs and Lamont took possession of the mining claims, and began to develop and operate the same as lessees, continued such work up to the latter part of November, 1907, and expended a substantial sum of money in so doing; that at the time last mentioned Lamont ceased working the mines; that after Lamont ceased to work the mines as aforesaid, plaintiffs continued further development and exploration, and expended in so doing the sum of $2,600; that Lamont ceased to work the mines at the time aforesaid because of a dispute or disagreement between himself and plaintiffs as to the method and manner in which the work should be prosecuted; that within the time fixed by the agreement plaintiffs tendered to defendants the sum of $5,000, and demanded a deed for the mining claims from defendants to themselves and said Lamont; and that Pritchard was ready and willing, and offered, to make such deed, in pursuance of the tender, but Lamont refused to do so.

To the amended complaint defendant Lamont filed an answer and cross-complaint, admitting that he ceased to work at the mines in November, 1907, as stated in the amended complaint; also making other admissions and denials, which are not necessary to further notice.

Trial was had to the court, which found the issues in favor of plaintiffs, and in the decree adjudged Lamont to execute and deliver a deed to plaintiffs for a one-sixth interest in the mining claims; also adjudged him to be indebted to plaintiffs for one-third of the $2,600 which represented the

expense incurred in working and developing the mines, by plaintiffs, after November, 1907, and after Lamont had ceased working the same, as stated.

There is no bill of exceptions in the record, although it is evident therefrom that more or less testimony was introduced at the trial. If the record proper fails to disclose reversible error in the proceedings below, the decree appealed from should be conclusively presumed to be founded upon ample evidence to sustain it, and ought not to be disturbed. The absence of a bill of exceptions leaves for the consideration of the court only the record proper, which consists of the pleadings, motions, and orders, findings and decree of the court.

We will first direct our attention to the amended complaint. It is there alleged that,

"The relations between plaintiffs and defendant Fred Lamont became strained and unpleasant in consequence of such differences (meaning failure to agree about the proper method of working the mines) and others of a like character, and at the end of November, A. D. 1907, the said defendant Fred Lamont ceased to work at said mines."

The part of the quotation, viz., "at the end of November, A. D. 1907, the said defendant Fred Lamont ceased to work at said mines," taken with other allegations of the complaint, shows beyond question that Lamont then and there severed all relations with plaintiffs as a co-lessee with them in operating the mining premises under the lease agreement, and then determined to withdraw, and did withdraw, from the venture, as a co-lessee with them under such agreement, and thereby surrendered all interest he may have had as such co-lessee. No other interpretation can be reasonably placed upon the language quoted.

It may be well at this time to fix the status of plaintiffs and Lamont, so far as concerns their working of the mines under the agreement.

In *Manville v. Parks et al.*, 7 Colo. 128, 2 Pac. 212, it is said:

"In *Charles v. Eschelman*, 5 Colo. 106, it is said that 'A mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine,' and the court then proceeds to point out some of the differences between a mining partnership and an ordinary trading partnership; but we apprehend that this language of the court, while applicable to the case before it, was not intended to restrict the definition of such partnerships solely to cases where a mine is owned by the parties working it, for it is evident that a mining partnership may exist as well where the parties have an interest merely in the working of a mine, or in carrying on mining operations, as where they own the mine itself. * * * Upon the contract with the owner of the mine, the defendants had an option of the property, in which the respective interests of each were defined and understood, while the working of the mine was for their joint benefit and profit, establishing such a community of interest in the adventure as constitutes a mining partnership."

To the same effect: *Meagher et al. v. Reed*, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; *Ashenfelter v. Williams*, 7 Colo. App. 332, 43 Pac. 664; *Hodgson v. Fowler*, 24 Colo. 278, 50 Pac. 1034; *Lyman et al. v. Schwartz*, 13 Colo. App. 318, 57 Pac. 735. From *Meagher et al. v. Reed, supra*, we quote as follows:

"It is undoubtedly a general rule that when two or more persons acquire mining property solely or principally for the purpose of extracting the ores, in the absence of an express intention to enter into a general commercial partnership, in the conduct of their mining operations, the relation existing between them in the transaction of their common business is a mining partnership, and not a general partnership. 1 Bates, Partn. § 163."

There is no direct allegation in the complaint that a partnership existed between the plaintiffs and Lamont, and no

allegation from which a partnership can be inferred, except the allegation that after the execution of the lease and actual possession of the mining property taken thereunder, plaintiffs and Lamont "agreed that all three of them should and would work, mine and operate the same under and in pursuance of said lease and agreement," and that thereafter they did so operate the mines until November, 1907, at which time, the complaint alleges, because of certain irreconcilable differences between the plaintiffs and Lamont as to the operation of the mines, the relations between plaintiffs and Lamont became so strained and unpleasant "that the said defendant Fred Lamont ceased to work at said mines; that plaintiffs continued to mine and operate the same under said lease and agreement for the joint interests of plaintiffs and defendant Fred Lamont."

It is plain that the only partnership implied from said allegations is that relation known under the laws of this state as a mining partnership, in its narrowest and most technical sense. The lease referred to is absolutely barren of any of the usual provisions of mining leases relative to the character or amount of work to be done, and does not aid the other allegations of the complaint in that respect; consequently, under the well recognized law, the mining copartnership existed by virtue of the joint operation of the mines, and terminated, so far as Lamont is concerned, when he ceased to work the mines; and thereafter, without an agreement, plaintiffs had no authority to operate them in his behalf or at his expense or make him liable for any cost or expenses of so operating them. There was no express agreement alleged, and nothing in the pleadings from which his consent to operate thereafter at his expense can be implied. Under these conditions of the pleadings, there is nothing upon which evidence was admissible to fix a liability upon Lamont for the expenses incurred by the plaintiffs after Lamont's withdrawal from the partnership. The judgment fixing such liability was not authorized by the allegations of the complaint under

any condition of proof. The record proper disclosed error, and it was not incumbent upon him to bring up the evidence by bill of exceptions. He is entitled to a reversal on the record brought here.

In the absence of a contract forbidding it, a member of a mining partnership may at any time withdraw therefrom, or sell his interest to any one he desires, without dissolving the partnership, except as to himself.

In *Meagher v. Reed, supra,* the following was cited with approval, from Collier on Mines, page 89:

"It was decided, after many doubts, that the mining partner had a right either to relinquish or transfer his share without the consent of his co-partners."

Our own appellate courts have repeatedly recognized and followed the rule stated by Mr. Collier. Lamont's withdrawal from the co-partnership by ceasing to work the mines as a co-lessee with plaintiffs, left plaintiffs free, without let or hindrance from Lamont, to work and explore the mines for valuable ores and minerals during the full term of the lease and bond. After such withdrawal, Lamont could not have had any claim upon plaintiffs for any profits they might have realized from ores extracted after that time, and there appears to be no good reason why he should be charged with any part of the expenses incurred by plaintiffs after that time. It will be remembered that the above quotation from the amended complaint is the sworn statement of plaintiffs themselves. It is not denied by defendants, and the statement therein that he ceased to work at the mines on the date given is conclusive against plaintiffs.

Counsel have discussed in their briefs a number of other questions, to which we have given consideration, but deem it unnecessary to make further reference to the same, as we discover no reversible error in the rulings and proceedings of the trial court of which complaint is made.

As the pleadings stand, and with the presumption indulged as to the evidence, there appears to be no good reason

why Lamont, after the tender, should have refused to execute and deliver the deed to plaintiffs for a one-sixth interest in the two mining claims, as he clearly bound himself to do in the bond and lease. By so doing he would have substantially performed the conditions thereof on his part, and avoided the anomalous act of deeding his own property to himself, which would have been the case had he complied literally with such conditions.

The judgment is reversed, with instructions to the District Court to enter a decree against Lamont, adjudging him to make, execute, acknowledge and deliver to plaintiffs, or any one they may designate, a good and sufficient deed for an undivided one-sixth interest in and to the two claims described in the lease and bond agreement, upon payment to him of the sum of $833.33; and that Lamont be adjudged to pay the costs.

We are authorized to say that Presiding Judge Cunningham concurs in this opinion, so far as it affirms the judgment, but thinks the judgment below should be affirmed *in toto*.

Reversed with instructions.

[No. 4064.]

THE TOWN OF CENTER V. COLLIER.

1. HIGHWAY—*Dedication—At Common Law*, operates by way of estoppel *in pais*, and not as a grant. To complete it, it must be accepted by the public authorities. (357)

2. —— *Filing Plat of Townsite—Effect.* The owner of lands files in the Recorder's office a town plat thereof showing lots, blocks and streets, but not acknowledged. This, with subsequent conveyances of lots, with reference to the plat, constitutes an offer to dedicate to public use the streets defined in the plat. The offer must be accepted by the public within reasonable time, or the right to accept is lost. (360)

3. —— *Acceptance*, may be manifested by an ordinance or resolution, by possession taken and improvements made, by use of the public for travel, and the like. (357)

4. —— *Revocation.* If the land owner, after the lapse of a reasonable time, without acceptance, conveys the lands designated upon the plat as a street, this is a revocation of the offer to dedicate. (361, 362)

Error to Rio Grande District Court. HON. CHAS. C. HOLBROOK, Judge.

MR. S. M. TRUE and MR. J. I. PALMER for plaintiff in error.

MR. JAMES P. VEERKAMP for defendant in error.

HURLBUT, J., rendered the opinion of the court.

On January 8, 1912, plaintiff in error (plaintiff below, and herein called plaintiff) instituted this action against defendant, to recover possession of a piece of land within its corporate boundaries. The complaint alleges that plaintiff is the owner of an easement over, and entitled to the possession of, a certain street known as Hurt street; that defendant is in possession and has refused to deliver possession after demand therefor; and that defendant wrongfully withholds possession from plaintiff.

The answer admits that defendant is in possession of the premises, but alleges she is the owner thereof, and denies every other allegation in the complaint.

The case was tried to the court without the intervention of a jury, and judgment went for defendant, to which exception was saved, and the case is here for review.

It appears from the record and briefs that only one question need be considered in order to determine this appeal, and that is, was there a complete common law dedication of Hurt street to the public? The following enumerated facts may be said to be conclusively established by the evidence:

On December 28, 1898, J. L. Hurt, then being the owner of the land upon which the townsite is located, filed for record in the clerk and recorder's office of Saguache County a plat which bore on its face the inscription, "Map of Centerview, Saguache County, Colorado," and which showed the land therein described as being platted into blocks, lots, streets and alleys, reciting the names of the streets and the widths thereof, and the numbers of the blocks and lots. Hurt street

ran north and south along the west line of block 10. The land in dispute is 150 feet north and south by 50 feet east and west, and adjoins the north half of block 10 on the west, being wholly within the lines of Hurt street, as marked on the plat. The plat was not acknowledged. Between the date of filing the plat and October, 1903, Hurt executed and delivered deeds to divers persons, at different times, therein conveying lots and tracts of ground, in each of which deeds reference was specifically made to such plat for identification of the land conveyed, and reciting that the plat was on record in the office of said county clerk and recorder. On January 26, 1900, Hurt conveyed to David Miles a plot of ground, by metes and bounds, of the dimensions of about 835 by 550 feet, which tract included the premises in dispute and all of Hurt street on the west line of block 10. Defendant acquired the premises in dispute from said Miles. She built a residence thereon in 1904, and was thereafter in actual possession of the disputed premises up to and at the time this suit was commenced. In October, 1908, said Miles signed, acknowledged and filed with said clerk and recorder, a plat of "Miles' Subdivision, in the Town of Center," which showed the vacant land lying south and west of block 10 to be platted into lots and blocks, and also showed thereon a continuation of the streets and alleys appearing on the Hurt plat, with the exception that the disputed premises were shown to be excluded from Hurt street as originally platted, leaving that street only 50 feet wide west of those premises, whereas the streets generally were 80 feet wide, the acknowledgment reciting that the streets and alleys shown on the plat were thereby dedicated to the public use forever. At, and prior to, the date of filing the Miles plat, that tract, with the exception of the disputed premises, was a field, enclosed by fence, had been cultivated by either Miles or Hurt, and the alleged street never had been used by the public.

The uncontroverted facts being as above stated, plaintiff contends that the filing of the plat by Hurt, his subse-

quent deeds for lots and land included within the platted premises, and his reference in such deeds to the recorded plat for further description, constituted a complete and irrevocable dedication, on his part, to the town of Center, of all the streets and alleys shown on the plat, including Hurt street; and that when he thereafter deeded the tract to Miles, which included Hurt street on the west line of block 10, Miles took title to the same subject to the easement created by Hurt's dedication.

On the other hand defendant contends that there never was such a dedication by Hurt; that the filing of the plat and the subsequent acts of Hurt in deeding to divers persons numerous lots by reference thereto, amounted only to an offer of dedication; that the town never accepted the same, either directly or by implication; hence Hurt had a right to revoke the offer before acceptance, which, she claims, he did, by conveying the tract to Miles.

It is conceded that there was no statutory dedication, because of the absence of an acknowledgment of the Hurt plat.

It seems to be well settled that a common law dedication operates by way of *estoppel in pais,* and not by virtue of a grant from the dedicator; also, that such dedication, in order to be complete, must be accepted. Many states, including Colorado, hold that, at common law, an offer to dedicate, without acceptance thereof by the public authorities, imposes no burden, and confers no rights, upon the municipality. Such acceptance can be manifested in various ways. A formal official act, such as a resolution or ordinance duly passed; the taking of possession of the street, etc., by the authorities, and grading and improving the same; the use thereof by the public as a highway for public travel and traffic, by pedestrians, teams, etc., and the open and exclusive exercise of authority by the public officials over the street offered, are some of the means adopted by municipalities to indicate acceptance of such offer.

There is a great diversity of opinion in the courts of last resort, as to the right of a fee owner in a common law dedication to revoke his offer to dedicate, even before the public has perfected such offer by acceptance. Abundance of authority may be found, affirming and denying such right, but the conclusions reached by us find support in the decisions of our own Supreme Court, therefore we will not further refer to other authorities.

One of the first Colorado cases upon the subject is *City of Denver v. Clements,* 3 Colo. 472, in which, among other things, it was decided that a common law dedication of land to public use may be made *in praesenti,* to be accepted by the public *in futuro,* and that the filing of a plot of property as an addition to a city, and the constant sale of lots for a period of five years with reference to said plat, under the circumstances of that case constituted a dedication of the streets to public use which could not be withdrawn by the owner. The case cited, if taken alone, as a controlling precedent, might seem to require the reversal of the judgment herein; but numerous later decisions of the Supreme Court have been rendered, in which different phases of the questions involved have been considered, and which, while adhering to the rule announced in the *Clements* case, that by the filing of a plat of urban property and the sale of lots with reference thereto, the owner makes an offer of dedication to the public of the public places designated on said map or plat which the owner may not withdraw *at his pleasure,* further hold that under certain circumstances the public may lose its right to accept such offer, and if before such acceptance the offer is revoked, or the public has otherwise lost its right to accept, the municipality loses its right to the public places designated on such plat. *City of Denver v. D. & S. F. R. Co.,* 17 Colo. 583, 31 Pac. 338; *Mouat Lumber Co. v. City of Denver,* 21 Colo. 1, 40 Pac. 237; *Trine v. City of Pueblo,* 21 Colo. 102, 39 Pac. 330; *Overland M. Co. v. Alpenfels,* 30 Colo. 163, 69 Pac.

574; *Town of Manitou v. Int. Trust Co.*, 30 Colo. 467, 70 Pac. 757.

In *City of Denver v. D. & S. F. R. Co., supra,* it is held that unless otherwise provided by statute, a dedication of a way, without acceptance, is in law merely an offer to dedicate, and that such offer does not impose any burden or confer any right on the public authorities, unless the road is accepted as a highway.

In *Mouat Lumber Co. v. City of Denver, supra,* the court referred to and approved the doctrine of the *Clements* case, as hereinbefore stated, but held directly that, notwithstanding an offer to dedicate, the city may lose its right to accept, and, under the circumstances in that case, that, *prima facie,* the city had lost its right. We quote from the opinion:

"The facts in this case are in many particulars similar to those in the case of *The City of Denver v. Clements, supra.* In that case, as in this, a plat had been prepared and made a public record. Upon these plats certain parts are designated as streets and certain other portions as alleys, these streets and alleys being a continuation of certain public streets and alleys of the city of Denver. After the filing of such plat, many lots were sold with reference thereto, and we hold in this case, in accordance with the opinion of the court in the *Clements* case, that these acts show an offer to dedicate on the part of the owner, which offer he may not withdraw at his pleasure. This does not, however, do away with the necessity for acceptance, and the city may under certain circumstances lose its right to accept. * * * It is also shown that in the center of one of these streets there is a dwelling house, erected in 1871, which has since that date been occupied as a place of residence without objection from any source. These uncontroverted facts, in view of the peculiar location of the property, * * * the surrender of connecting streets for railroad and other purposes, we think are *prima facie* sufficient to show that the city did not intend to accept

the property as a part of the public streets of the city of Denver."

In *Trine v. City of Pueblo, supra,* certain acts had been performed by the owner of land which it was claimed manifested an intent to make an irrevocable dedication to the public of the land in controversy as a street, but after said acts, the land claimed to have been dedicated had been conveyed by the owner before any act of acceptance by the city. The court, after citing with approval the opinion of Justice Elliott in *City of Denver v. D. & S. F. R. Co., supra,* said:

"It is clear, therefore, that the subsequent conveyance of the land by O'Connell to plaintiff was a revocation of the offer to dedicate the same as a street," etc.

In *Overland M. Co. v. Alpenfels, supra,* it is said (per haps *arguendo*) that while, by the filing of the plat of an addition to a city, upon which was delineated a street, and the sale of lots with reference to said plat, but where there had been no acceptance by the city so as to *constitute such act a common law dedication,* owners of the addition would be estopped to deny the existence of such street as a public highway, as between themselves and the purchasers of lots, nevertheless the city would not be so estopped.

In *Town of Manitou v. Int. Trust Co., supra,* wherein the principal issue was as to whether or not there had been a common law dedication to the public of certain tracts of land within the corporate area of the town, the court had under consideration, and referred to and discussed, all the cases hereinbefore cited, and said:

"By these decisions it is settled:

That the sale of lots by reference to a recorded map or plat upon which are shown public places is an offer to dedicate such public places to public use, and that the offer may not be withdrawn at the pleasure of the grantor.

That there must be an acceptance, express or implied, of such offer by the public authorities within a reasonable time;

and that unless the offer is accepted within a reasonable time, the public may lose its right to accept.

That the question as to whether there has been an acceptance within a reasonable time, depends upon the facts and circumstances of the particular case.

That within a reasonable time after an offer to dedicate, as shown by the sale of lots, the public authorities may take possession of public places designated as such on a plat or map, and, in doing so, may rely upon the act of the grantor in making sale of lots by reference to such map or plat.

That unless the public authorities, within a reasonable time, accept such offer to dedicate, they lose their right to accept, and the municipality loses its right to the places designated on such plat as public places."

In the application of the law, as so settled, we find that in the instant case it is conclusively shown that there had never been any act on the part of the public authorities of Center indicating an acceptance of Hurt's offer of dedication of such street; that the street at that point had never been used as a public highway for travel; that no grading or improvement of the same had ever been done by the town, or anything else evincing an intention on its part to use the street as a public thoroughfare; that the town never assumed possession of the street; that defendant built her house on the disputed ground and occupied the same continuously and peaceably for about seven years; that no objection or protest whatever was made on behalf of the town to her so doing; and that during all of said time the town knew she was claiming the disputed premises as her own, adversely to it. With these uncontroverted facts before us, and the finding of the trial court in favor of defendant on all material issues involved, we reach the conclusion that the town never accepted Hurt's offer of dedication of said street, and, upon all the circumstances of this case, is estopped from now asserting any right to defendant's said parcel of land because of said dedication. We are also of the opinion that as to the municipality,

the acts of the owners of said ground, including the giving of the deed by Hurt to Miles, constituted a revocation of Hurt's offer to dedicate said street, and for that reason the town possesses no legal right to dispossess the defendant.

We might observe in conclusion that, while the judgment of the lower court is right and just, and well supported by authority and the record, we are unable to discover wherein the town suffers any serious damage or inconvenience thereby, as it appears from the plat filed by Miles, being a statutory dedication, that Hurt street is still dedicated to the use of the public as a highway, as it has always been, with the exception that its width is reduced to 50 feet, just west of the disputed premises, which would still appear to be ample for public use in a village of the size of Center.

Cunningham, P. J., concurs in the conclusion reached, but bases his concurrence entirely upon the question of estoppel *in pais*.

Judgment affirmed.

[No. 4103.]

PHILLIPS INVESTMENT COMPANY, ET AL. V. SCHOOL DISTRICT NO. 5, BENT COUNTY, ET AL.

1. SUNDAY—*Election Notice Posted Upon.* The notice for a school district election, upon the question of issuing bonds for raising funds to construct and equip a school-house, may be effectually posted upon a Sunday. (364)

2. ELECTIONS—*Substantial Compliance with Statute.* An election to determine whether a school district shall issue its bonds for a purpose authorized by statute will not be invalidated by technical irregularities, no prejudice to any person appearing, e. g. the failure to publish the notice of the election for the full time prescribed by statute; or the failure of the school board, who acted as judges of the election, to certify to themselves the result of the election, before canvassing the vote, as expressly required by statute (Laws 1909, c. 205, sec. 7). (365)

3. MAXIMS—*Lex non cogit ad vana.* The statute expressly required the judges of certain school district elections to certify the result to the Board of Directors of the district, and provided that the board should, "after receiving such return," canvas the vote and determine the result of the election. (Laws 1909, c. 205, sec. 7) The directors having themselves acted as judges of the election, their failure to certify to themselves what was already within their knowledge had not the effect to invalidate the election. (365, 366)

Error to Bent District Court. HON. A. WATSON MCHENDRIE, Judge.

MR. GRANBY HILLYER for plaintiffs in error.

MESSRS. MERRILL & MCCARTY for defendants in error.

CUNNINGHAM, P. J., rendered the opinion of the court.

The contention involved in this case presents a naked question of law. The facts which are either conceded or not in dispute are as follows: The board of directors of the school district, on petition properly presented, held a special election for the purpose of voting bonds with which to construct and equip a school building in said district; the election was held, resulting in a vote of thirteen to nine in favor of the issuance of the bonds. The plaintiffs in error, on behalf of themselves and all other taxpayers similarly situated, brought an injunction proceeding for the purposes of restraining the issue or sale of the bonds. After issues were joined a temporary restraining order was issued by the judge of the District Court, but upon final hearing the restraining order was dismissed. The court made a general finding in favor of the defendants in error and denied plaintiffs any relief.

The notices required by the statute for elections of this character were posted on a Sunday, just twenty days before the election was called. The statute prescribes twenty days' notice. Plaintiffs in error contend that the posting of the notices on Sunday was illegal; that such posting was in the nature of process, and that under the ruling in *Schwed v. Hartwitz*, 23 Colo. 187, 47 Pac. 295, 58 Am. St. 221, service of process on Sunday in a civil action is invalid in this state.

The second and only other contention advanced on behalf of plaintiffs in error is as to the canvassing of the vote, or rather the failure, as it is alleged, of the board of directors to canvass the vote.

We will consider the two contentions advanced by plaintiffs in error in the order stated.

1. It was ruled in *Schwed v. Hartwitz, supra*, that the publication of a tax sale notice in a Sunday paper is void, and a sale made thereunder accordingly illegal. The tax sale notice involved in the *Schwed* case was published in a Sunday paper only, that is, all the issues of the paper containing the tax sale notice were published on Sunday. It should be borne in mind in this connection that the courts of this state, in common with the majority of the courts of the country, have resolved all doubts in matters of procedure and compliance with statutory requirements in favor of the fee owner in tax sale proceedings. The same strictness is not required, as we shall later on point out, in matters pertaining to elections, even where such elections are conducted for the purpose of determining upon a bond issue. We have no authority or disposition to question the conclusions reached in the *Schwed* case, but we are not disposed to think that the rule therein announced as to Sunday publications should be extended and made applicable to or decisive of election proceedings such as those here under consideration.

If we are correct in our conclusion that the posting of the election notices on Sunday was valid, then the statutory requirement of twenty days was satisfied, and we might with propriety conclude this branch of the case without further comment; but we are satisfied that by the great weight of authority the judgment of the trial court should be sustained, even though Sunday, the day on which the notices were posted, be not considered in reckoning the time the notices were posted, since there is no allegation in the complaint, nor was there any proof on the trial, that the result of the election was in anywise affected (except technically, perhaps) by any defect in the posting of the notices.

In *Seymour v. Tacoma*, 6 Wash. 425, 33 Pac. 1059, it was held that an election notice published but twenty-six days and posted but twenty-six days, when the law required publication and posting for thirty days, was a substantial compliance with the requirements of publication and posting,

where it was plain that the omission had no effect upon the results of the election. In the Seymour case the Washington court had under consideration the question of the legality of a bond issue. See also: *Ardmore v. State,* 24 Okla. 862, 104 Pac. 913; *Town of Grove v. Haskell,* 24 Okla. 707, 104 Pac. 56.

In the Fifth Edition of Dillon on Municipal Corporations (Vol. 2), Section 981, it is said that:

"When there has been a substantial compliance with the requirements of the law, regulating the manner in which elections to pass upon an issue of bonds shall be held, and it appears that there has been a fair election thereunder, the election will not be affected by technical irregularities, and this rule has been held to apply to the time and manner of the publication of notice."

On page 1386, in a foot-note, Judge Dillon cites numerous authorities to support the text quoted; and in Vol. 1, Sec. 374, of the same work, Judge Dillon says:

"It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election."

More than a score of cases are cited from various states of the Union supporting this rule, which is in accord with numerous decisions of our own Supreme Court. See *People v. Earl,* 42 Colo. 238, 94 Pac. 294; *Littlejohn v. People,* 52 Colo. 217, 121 Pac. 159, Ann. Cas. 1913D, 610. See; also McCrary on Elections, Sec. 225; *Dishon v. Smith,* 10 Ia. 212.

2. The members of the school board in the present case acted as the judges of the special election, there being but one voting place in the precinct or district. Under such circumstances it is conceded the statute permits school boards to so act, if they desire. When the polls had closed, the members of the school board, sitting as judges, counted the votes and announced the result—thirteen to nine in favor of the bond

issue. Thereafter, in the minutes of their meeting, the board made a record of the vote as the same had been announced. It is contended by plaintiffs that under the statute it was the duty of the election judges to certify to the members of the board the result of the election, and it thereupon became the duty of the school board to canvass the returns and make a record thereof. This is clearly the reading of the statute. The query is: Must the election judges, when they chance to be the members of the school board, certify to themselves, as members of the school board, what they already know, and know officially, to-wit: the result of the election? It is admitted by the defendants that they did not so certify the result of the election to themselves, but it is not contended on behalf of the plaintiffs that the vote was not thirteen to nine in favor of the bond issue. The contention of plaintiffs as to the last point, viz: the canvassing of the returns, is not tenable. The authorities which we have already cited upon the question of the sufficiency of the notices will apply equally to the canvassing of the returns. In support of the contention just stated plaintiffs rely upon the opinions rendered in *Krieschel v. Board of County Commissioners,* 12 Wash. 428, 41 Pac. 186; and *Heffner v. Board of County Commissioners,* 16 Wash. 273, 47 Pac. 430.

The opinion in the first case, if the facts were sufficiently similar to make it at all applicable, which they are not, would be weakened by the fact that it was rendered by a divided court, the judges voting three to two. However, the dissimilarity of the facts in the *Krieschel* case makes it of no value whatever as an authority in this case. That case grew out of a special election for the purpose of removing a county seat. The statutes of Washington required that the returns should be certified to the board of county commissioners. The board of county commissioners did not, as did the members of the school board in the instant case, act as the election judges. Moreover, the Washington opinion clearly indicates bad faith on the part of a majority of the board of commissioners, and

that the canvass was dishonestly made and for a sinister purpose.

The other Washington case relied upon by plaintiffs in error, viz: *Heffner v. Board of County Commissioners,* tends to support the contention of the school board in this case, rather than the contention of the plaintiffs in error, for in that case the court held that a canvass of the vote made by the board of county commissioners *long after the time prescribed by the statute for the performance of that duty was not fatal.* On this point the Washington court said:

"No penalty is provided for non-performance, and the canvass, when completed, accomplished the purpose contemplated by the statute, because it determined the result of the election. And we are, therefore, of the opinion that it was equally as efficacious as if it had been made within the time directed by the legislature."

No court in the country has gone further than the Supreme Court of Washington in brushing aside mere technicalities when the same have been urged for the purpose of overthrowing elections. See *Murphy v. City of Spokane,* 64 Wash. 681, 117 Pac. 476; *Seymour v. Tacoma, supra; Janeway v. City of Duluth,* 65 Minn. 292, 68 N. W. 24; *Ackerman v. Haenck,* 147 Ill. 514, 35 N. E. 381; *Williams v. Shoudy,* 12 Wash. 362, 41 Pac. 169; *Knight v. Town of West Union,* 45 W. Va. 194, 32 S. E. 163; *Epping v. City of Columbus,* 117 Ga. 263, 43 S. E. 803; Simonton on Municipal Bonds (1896), Sec. 71.

Perceiving nothing in the judgment of the trial court prejudicial to the substantial rights of the plaintiffs in error, the same will be affirmed.

Affirmed.

[No. 3822.]

REYER, ET AL. V. TEARE.

1. EVIDENCE—*Relevancy.* Barton and Blaisdell owned a tract of land in undivided moieties. Barton, by a deed not recorded, conveyed his moiety to Blaisdell, merely to enable the latter to effect a sale thereof for Barton. Subsequently Barton and others, in an action against Blaisdell, levied an attachment upon the whole tract, as the property of Blaisdell. *Held* that correspondence between Barton and Blaisdell, solely in reference to Barton's interest, and his conduct as Blaisdell's agent had no tendency to give notice to any of the plaintiffs of any sale, or contemplated sale, of Blaisdell's interest. (369-372)

2. ATTACHMENT OF LANDS—*When the Lien Attaches.* Whenever a copy of the attachment writ, with a description of the property attached, is filed with the Recorder of the county where the land is located. (374)

Appeal from Denver District Court. HON. GEO. W. ALLEN, Judge.

MR. NORTON MONTGOMERY, MR. HORACE N. HAWKINS for appellants.

MR. ROBERT M. WORK, MESSRS. VAN CISE, GRANT & VAN CISE for appellee.

HURLBUT, J., rendered the opinion of the court.

Reversed with instructions.

January 15, 1910, appellee, as intervenor, filed his petition of intervention in the case of *Reyer et al. v. Blaisdell,* No. 3911, decided at this term. In the latter case plaintiffs sued out a writ of attachment in aid, and caused the same to be levied upon property standing of record in the name of defendant.

The petition alleges in brief that on or about September 19, 1909, said writ of attachment was levied upon certain described real estate in Morgan County as property belonging to defendant Blaisdell; that at the time the writ was levied, and for sometime prior thereto, said intervenor was and had been the owner in fee simple of the same; that the levying of the writ as aforesaid cast a cloud upon his title, and, by reason thereof, he had been hindered and prevented from pro-

curing a loan thereon, and from making sale thereof; that he will be obliged to pay divers sums in witness fees, costs, and other expenses, to secure a discharge of the lien created by the levy. It is further alleged on information and belief that at the time the writ was levied plaintiffs knew that the property attached belonged to intervenor; that plaintiffs, in causing said levy, did so wrongfully, unlawfully, maliciously, and under circumstances showing a wanton and reckless disregard of the intervenor's rights and feelings; that by reason thereof, intervenor had been damaged in the sum of $3,000 actual damages, and $500 exemplary damages; closing with a prayer that the attachment be discharged so far as applicable to intervenor's property, and for $3,500 damages.

Answer to the petition was filed, denying the allegations thereof, but admitting the levy of the writ of attachment as alleged; alleging that at the time the writ was levied the property attached stood on the records of Morgan county in the name of said defendant Blaisdell; that if, at the time of issue and levy of the writ of attachment, intervenor had any interest in the property attached, it did not appear of record, and plaintiffs had no knowledge or information thereof. Replication filed.

The case was heard on the merits, without a jury, and the trial judge rendered judgment in favor of intervenor in the sum of $2,000, from which judgment this appeal is prosecuted.

The following facts are shown by the record to be undisputed, viz: The writ of attachment was issued September 15, 1909, filed for record in Morgan county September 16th, and served upon defendant September 20th. At the time the same was filed, the records of that county showed that defendant Blaisdell owned an undivided one-half interest in and to the property attached, and that no title to the premises appeared of record in the name of intervenor. Prior to the issuing of the writ of attachment and levy thereof, intervenor had a warranty deed for the premises attached, from defend-

ant, dated July 15, 1909, but the same was not recorded until October 7, 1909. In 1907 plaintiff Barton executed and placed in the hands of defendant Blaisdell a deed for the undivided one-half of the land in controversy, but by express agreement and understanding between them no title passed, it being agreed that Blaisdell was to hold the deed in his possession and seek for a purchaser of Barton's interest in the premises, and said deed was to be considered as delivered only in case such purchaser was found and sale made.

The above facts being undisputed, but one question need be considered to determine this appeal, and that is: At the time of the issue and levy of the writ of attachment, did plaintiffs have information of intervenor's unrecorded deed to the premises attached, or knowledge of any facts concerning the same that would put them, as prudent men, upon inquiry as to its existence or non-existence? We will briefly review the evidence on this point. Defendant plainly and repeatedly testified that on this occasion he first met Barton Friday morning, September 17, 1909, before either the attachment papers or summons had been served upon him, and told him he had sold his interest in the land and was ready to pay him the money. The record shows that on September 20th Barton received from Blaisdell a letter dated September 13th, therein stating that he (Blaisdell) thought he had succeeded in selling Barton's interest in the property. From this it appears that Barton knew nothing of the sale of his interest until after the writ of attachment had been levied and the lien fastened upon the property. Appellee's counsel urgently insist that in the letters and telegrams passing between Barton and Blaisdell before the suit was brought it appears that the former knew his interest had been sold or was about to be sold. We do not think so. We have carefully read this correspondence and discover nothing therein to justify Barton in believing his interest had been sold or pledged in any manner. It goes no further than to show that for the greater part of two years prior to the levy Barton had repeatedly and earnestly

urged Blaisdell to sell his (Barton's) interest in the land; that on June 8, 1909, Barton made a specific offer (by letter and wire) to defendant to sell him his interest in the premises for $500, and that defendant, by letter of June 12th, accepted the same. The subsequent correspondence however shows defendant never acted on the acceptance or paid anything thereon. Barton, by letter, censured defendant for failing to carry out his contract, and severely criticised him for not sending the money in pursuance of his acceptance. A letter, dated August 3, 1909, reads in part as follows:

"Your letter of July 27th received, in reference to the land at Fort Morgan. When I offered to sell you my entire interest in the same for five hundred dollars ($500) that was a direct offer to you, and was intended for immediate acceptance by you, cash to be sent to me at once. Your reply accepting my offer was agreeable to me, and I certainly expected you to send the five hundred dollars ($500) with your acceptance. I cannot wait until you scour the country for a buyer before you settle, and request that if you want my interest at that price send in five hundred dollars ($500)."

August 24th Barton again wrote defendant, from which the following is taken:

"I am very sorry to hear that you have called off the sale of the Rickle ranch (land in issue). When one accepts a man's offer, you would think it was for immediate purchase. I know it is so in all other transactions, so I cannot see why it would not be in this one. You accepted my offer. But we will let it rest there."

It would therefore appear from these letters that as late as July 27th defendant had entirely abandoned any intention to purchase and pay for Barton's interest under the offer and acceptance of June 8th and 12th. From Barton's letter of August 24th, just referred to, it appears that Blaisdell had been trying to sell the former's interest to some one else, but had called the deal off. From this situation how can it be reasonably said that Barton was warranted in believing that

his interest had been sold to any one, or that any option or deal was pending therefor? As late as August 24th, Barton knew of no one who was contemplating the purchase of his interest, nor did he know of any option or deal pending for the sale thereof. Under such circumstances, and in the light of this correspondence, a prudent man in Barton's position would consider that at the time he came to Denver, about September 12th, the contemplated sale to Blaisdell had long since been abandoned, and that no other person was even considering a purchase of his interest, and particularly would he be justified in this belief as the relations between himself and Blaisdell had at that time become somewhat strained.

We have thus far been considering the question of notice to Barton of a sale or contemplated sale of *his own* interest in premises attached. It is entirely immaterial to any issue in this case, and we only discuss it because of the correspondence upon which defendant in error so strongly relies to show notice to plaintiffs of the existence of intervenor's unrecorded deed at the time of the levy. In all this correspondence, aside from the letter of September 13th from Blaisdell to Barton (above mentioned) and which was not received by the latter until after the suit had been brought and writ levied, there is not a scintilla of evidence that even tends to show that Barton, or any of his co-plaintiffs, had any knowledge or information that Blaisdell had sold or intended to sell *his own* interest in the attached premises prior to the levy. The writ was levied only upon the right, title and interest, of Blaisdell in the premises. As we read the record, plaintiff fails to show that, at the time of the levy, any of the plaintiffs had notice of intervenor's unrecorded deed or of any facts that would put them upon inquiry as to its existence, and therefore failed to establish that the writ of attachment was wrongfully levied upon his interest in the premises. Under the case as made by the pleadings, the intervenor could not possibly recover against plaintiffs unless he had shown by a fair preponderance of the evidence that the writ of attachment in

question had been wrongfully levied upon his property and that such levy caused the damage complained of. The property attached, standing of record in the name of Blaisdell (defendant), was lawfully levied upon by the writ, unless the intervenor proved that, at the time, plaintiffs had notice of his unrecorded deed. There is no contention on behalf of the intervenor that any of Barton's co-plaintiffs had *actual* knowledge of the unrecorded deed, or of any facts suggesting the possible existence thereof. Appellee only seeks to charge them with such knowledge because (as he claims) their co-plaintiff Barton possessed such knowledge. It is unnecessary to decide this question, as we have already concluded that the record fails to show that even Barton possessed this knowledge.

It might be here said that the findings and judgment of the trial court in this case do not mention or refer to the writ of attachment, or pass upon the question as to whether or not it was wrongfully issued in the first instance, or wrongfully levied upon the property of the intervenor. Such findings and judgment are simply in favor of the intervenor, his damages being assessed at $2,000. The trial court appears to be entirely consistent in this regard. It is apparent that the court only considered on the trial of this intervention the question of damages sustained by the intervenor, because, over a month before, it had found judgment in favor of defendant Blaisdell as against the plaintiffs, and dissolved the writ of attachment sued out in aid of the action. This being the condition of the trial court's record at the time of the hearing on the intervention, it could do nothing else than consider the writ of attachment as having been improperly issued in the first instance, or that under the traverse the grounds of attachment were not sustained. In the main case referred to, we have reversed the lower court and held it was error to render judgment against Barton's co-plaintiffs, and was also error to sustain the traverse to plaintiff's affidavit, and dissolve the attachment. It therefore follows that

the writ of attachment was properly issued, and the levy thereof fastened a lien upon defendant's interest in the premises attached, and such lien was enforceable against the interest of intervenor in the premises, notwithstanding his unrecorded deed therefor.

Something has been said by counsel touching the time when a lien on real property becomes effective under levy by writ of attachment, and they seem to contend that the lien does not become effective until after the recording and service of the writ upon defendant. The Supreme Court has decided to the contrary, and holds that a valid lien is created upon real property at the time the copy of the writ, together with a description of the property to be attached, is filed with the recorder of the county where the property is located. *Raynolds v. Ray*, 12 Colo. 108, 20 Pac. 4.

It follows from what has hereinbefore been said that the court erred in rendering judgment against plaintiffs, and the same will be reversed with instructions to the lower court to dismiss the action at appellee's costs.

Reversed with instructions.

[No. 3823.]

McCUTCHEN, ET AL. v. KLAES.

1. CONTRACTS—*Executed.* Only when nothing remains to be done, by either party, is the contract said to be executed. Plaintiff verbally agreed to sell lands to defendants, conveying a merchantable title. Her conveyance was executed, accepted and recorded, and part payment made upon the promised consideration. But upon examination of the records it appeared that plaintiff had no title. *Held* that the contract was still executory. (376, 377)

2. VENDOR AND VENDEE—*Defective Title Conveyed—Remedies of Vendee.* Where the vendor having stipulated to convey a merchantable title delivers a conveyance which, while assuming to convey a perfect title, in fact passes no title at all, and having received part of the purchase money still retains possession of the land, the vendee may sue to rescind. He is not remitted to an action upon the covenants in the deed. (379)

3. —— *Vendee Entitled to a Merchantable Title.* Under an executory agreement for the conveyance of real estate the vendee is entitled to a marketable title, unless he has expressly agreed to accept whatever title the vendor may be able to convey. (378)

4. MAXIMS—*Alleging Contraries.* One suing upon a contract for the conveyance of lands, counting upon the failure of defendants to perform, cannot shift to the theory that by his conveyance, accepted by defendants, the contract has become an executed contract, so that defendants are remitted to an action upon the covenants in the deed. (378)

5. CONVEYANCE OF LANDS—*Conditional Acceptance.* Plaintiff agreed with defendants to convey to them a merchantable title to certain lands, and in fact delivered a conveyance with full covenants, assuming to convey a perfect title, free of encumbrance. Defendants accepted the deed with the understanding that the title should be examined and found to be clear of exception; nevertheless they made part payment. The record being examined it was discovered that the plaintiff was without title. *Held* that defendants, upon reconveyance of the land, were entitled to recover what they had paid. (379)

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

MR. B. C. HILLIARD, MR. F. R. LILYARD, MR. J. R. ALPHIN for appellants.

MR. BERT MARTIN, MR. ALBERT S. FROST for appellee.

KING, J., delivered the opinion of the court.

Judgment reversed.

Appellee, hereinafter called plaintiff, brought her suit against the defendants upon an executory contract to recover the unpaid portion of the stipulated purchase price of certain real estate. The complaint alleged that a "verbal contract" was entered into, by which plaintiff agreed to sell, and defendants agreed to buy, said real estate for a consideration of $1,450, of which $750 was to be paid in money and $700 by delivery of certain horses, and that upon payment of the consideration, plaintiff agreed to convey said real estate by good and sufficient warranty deed, subject only to a trust deed encumbrance for the sum of $2,200; alleged the execution and delivery by plaintiff to defendants of a good and sufficient warranty deed according to the terms of the contract, and the acceptance and record thereof by defendants; that no part of the purchase price had been paid, with the exception of $203, and prayed judgment for $1,247, with interest.

Defendants filed answer and cross-complaint, admitting the agreement substantially as alleged in the complaint; admitted the delivery and record of the deed, but alleged that according to the terms of the contract, and the covenants of the deed so delivered, defendants were to receive the said real estate with a clear, unencumbered, merchantable title, except for the trust deed mentioned; that the deed delivered was a warranty deed with full covenants of warranty as to good, sure and indefeasible title; that the defendants received the deed with the understanding that the title should be examined and found to be perfectly clear and marketable before the purchase price should become due and payable; that upon examination it was found that one of deeds of *mesne* conveyance necessary to make a good title was void; that immeditely upon discovery of this defect in title, defendants notified plaintiff thereof, tendered a reconveyance to plaintiff, demanded a return of the purchase money paid; by cross-complaint offered to make reconveyance and place the plaintiff in *statu quo,* and asked for a rescission of the contract, return of that portion of the purchase price paid, and damages.

All the material allegations of defendants' answer and cross-complaint necessary to a determination of this case in their favor are established by the evidence. On September 3, 1909, a deed with full covenants of warranty as to title, etc., was executed by plaintiff and delivered to defendants. Within a few days thereafter $302 was paid by defendants upon plaintiff's order or checks, and two of the horses were delivered. Upon examination of the abstracts of title, the void deed hereinbefore mentioned was discovered, whereupon defendants promptly notified the plaintiff of the defect in the title, tendered a reconveyance of the title, and demanded a return of the amount paid on the purchase price and redelivery of the horses, and compensation for expenses paid and incurred. Within a short time thereafter, the tender of reconveyance and demand for return of purchase price, with damages, was repeated, and both times refused by plaintiff. The

evidence quite clearly shows that both parties agreed upon a rescission of the contract, but could not agree upon the terms; that a number of efforts to effect a settlement, and counter-proposals, were made, without reaching an agreement, whereupon this suit was brought. The court instructed the jury that the deed from plaintiff did not convey a merchantable title as required by the contract, but that if they found and believed from the evidence that when the plaintiff delivered the deed and defendants accepted the same, it was so delivered and accepted with the intention and understanding of both parties that it was delivered and accepted as a final conclusion of the contract, the plaintiff would be entitled to recover the unpaid portion of the contract price; and further that if the jury should find from the evidence that the defendants, with knowledge of the defect in the title, accepted the warranty deed, then the defendants were estopped from raising that objection to the sufficiency of plaintiff's performance of the contract, and the verdict should be for the plaintiff for the unpaid portion of the purchase price, not to exceed $1,247, with interest, on which instruction the jury returned a verdict for the plaintiff.

Plaintiff's contention is that, although she sued upon the contract of purchase and sale, and for failure of defendants to perform the same, said contract was an executed contract, and that defendants' remedy, if any they had, was upon the covenants of warranty in the deed, and not upon a breach of the contract sued upon. With this contention we do not agree. The contract, when sued upon, was executory. An executed contract is one in which nothing remains to be done by either party.—*Fox v. Kitton*, 19 Ill. 519, 532; *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558; *Adams v. Reed*, 11 Utah 480, 40 Pac. 720, 724; *State v. Jersey City*, 39 N. J. Law 575, 581, 86 Am. Dec. 240. It is a contract in which all the parties have performed all the obligations which they have originally assumed.—*Watkins v. Nugen*, 118 Ga. 372, 45 S. W. 262, 263. An executed contract is not properly

a contract at all. The term is used to signify rights and property which have been acquired by means of contract. The parties are no longer bound by a contractual tie.—*Mettel v. Gales,* 12 S. D. 632, 82 N. W. 181.—Vol. 3, Words and Phrases, "Executed Contract." An executory contract is one in which something remains to be done by one or more of the parties.—*Watkins v. Nugen, supra.* A defective deed, being only a contract to convey, is an executory contract.—*Adams v. Reed, supra.*

It is true that a deed in the form agreed upon had been executed and delivered, and accepted pending the examination of title, and to that extent only was the contract executed by the plaintiff. At all times she retained possession of the premises conveyed, and collected and appropriated the rentals. The deed did not give good title, nor could it. The purchase price had not been paid by the defendants, and in that respect the contract was not executed by them; in fact, as has been stated, the basis of the complaint is the alleged failure of the defendants to perform their part of the executory contract. The plaintiff, having sued on the contract, cannot shift the theory upon which she proceeded, so as to prevent the defendants from making any legitimate defense to the contract.

In *Price v. Immel,* 48 Colo. 163, at page 170, 109 Pac. 941, 945, the court said:

"The vendee under an executory agreement to purchase real estate has a right to insist upon a marketable title—that is, one without defects of which he can lawfully complain, unless he has *expressly agreed* to take such title as the vendor may be able to convey."

We have held that the contract sued on was executory, and there is no pretense of an express agreement to take less than a good marketable title. There was no evidence to go to the jury upon which they could find, or draw a legitimate inference of, an unqualified or unconditional acceptance of the deed as compliance with the contract for a merchantable title.

For the reasons given, the authorities relied upon by plaintiff which hold that upon an executed contract of sale, where the deed has been delivered and accepted, and purchase price paid, the grantee's remedy thereafter, if any, in case of a defective title, will, in the absence of fraud or mistake, be upon the covenants of the deed, and not upon the contract, are not applicable, and the defendants had a right to rescind the contract and recover the portion of the purchase price which they had paid, upon tender of reconveyance and offer to place the plaintiff in *statu quo,* which they did within a reasonable time. The only question thereafter to be submitted to the jury was the terms upon which rescission should be made, so as to restore the legal *status* of the parties. The trial court found that the title conveyed by the deed delivered by the plaintiff to the defendants was not a good or merchantable title, to which finding no exception was taken. The jury should have been instructed to render a verdict for the defendants, and judgment should have been rendered, and should now be rendered, for defendants, conditioned upon delivery of deed reconveying the title as tendered, and ordering plaintiff to repay to defendants all sums paid and property delivered on the purchase price. Whether defendants were entitled upon their cross-complaints to recover any additional amounts as expenses paid or loss sustained is a matter to be determined by the court, or by the jury upon appropriate instructions.

The judgment is reversed and cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

[No. 3996.]

LARIMER COUNTY CANAL NO. 2 IRRIGATING COMPANY ET AL. V. LARIMER AND WELD RESERVOIR COMPANY ET AL.

1. INJUNCTION—*To Restrain Trespass to Land—Title Immaterial.* Defendants having accepted a proposition of plaintiffs by which they were to enjoy certain irrigation works of plaintiffs upon certain conditions, among others that defendants should pay a certain sum of money, entered upon these works and assumed to make changes therein for their own convenience. Injunction allowed, restraining them from entering upon or utilizing the works of plaintiff until they had fully complied with the conditions of their agreement. (383-386)

Held, further, that the title to the site of the dam was immaterial, so long as no title appeared in defendants. (383)

Many examples cited of like relief granted in like cases.

2. TRESPASS TO LANDS—*Irrigation Works.* Neither the acts of Congress in relation to the public domain, nor the statutes of the state regulating irrigation, permit an entry upon the irrigation works of another, without his consent, or appropriate proceedings at law. (384)

3. ESTOPPEL—*By Conduct.* Plaintiffs being about to begin the construction of certain irrigation works, offered defendant an undivided interest in the contemplated works, upon certain conditions, one being the payment of $1,000. Defendants accepted the offer and paid $400.00 on account of the $1,000, but made no promise to pay, and never did pay the remaining $600. Nevertheless, defendants, later, entered upon the dam, cut a channel therein for the passage of water to a new headgate in their own ditch, and in an action brought by plaintiffs for an injunction, claimed an interest in the plantiff's works, by virtue of the payment of the $400, and its retention by plaintiff.

Held they were estopped to deny acceptance of the offer made by plaintiff, and before they were entitled to enter upon plaintiff's works, or interfere with plaintiff's control thereof, they were under duty to pay the residue of the stipulated amount (385)

4. DAMAGES—*Tresspass to Land.* Defendants having wrongfully entered upon a dam constructed by plaintiff, and cut a passage through the same, for their own use, without right, *held* on bill for an injunction brought by plaintiffs that the cost of the restoration of the plaintiff's works to their former condition was an element of damages, without regard to the contractual relation existing between the parties, the conditions of which had never been performed by plaintiff. (385)

Error to Larimer District Court. HON. NEIL F. GRAHAM, Judge.

MR. R. W. FLEMING, MR. W. M. AULT for plaintiffs in error.

MESSRS. RHODES & FARNSWORTH for defendants in error.

On rehearing.

KING, J., delivered the opinion of the court.

In the spring of 1907, at an expense of about $7,000, plaintiffs constructed a substantial cement dam, beginning at the headgates of their ditches on the south bank of the Cache la Poudre river, and thence extending across the Cache la Poudre river to the north bank thereof, a distance of about 150 feet, for the purpose of diverting the waters of said stream into the headgates of their said ditches. To protect the dam from being cut out by high water, plaintiffs constructed an earthwork dyke or wall, extending from the north end of the dam, up the stream, and along the bank thereof, about 300 feet, to a certain ditch, known as the Little Cache la Poudre ditch, and headgates thereof, belonging to the defendants. Before work on the dam was commenced, plaintiffs submitted to defendants an offer by which, upon payment of $1,000, defendants might become the owners of an undivided interest in the dam about to be constructed by plaintiffs, and entitled to put into said dam necessary headgates for the diversion of defendants' appropriation of water from the river, and that thereafter defendants must pay a share of the cost of maintenance and repair of the dam in the proportion that the sum of $1,000 bears to the entire cost of the dam. The Little Cache la Poudre ditch was the property of the defendant The Little Cache la Poudre Irrigating Company, which occupied and used it jointly with the defendant, The Larimer & Weld Reservoir Company, under an agreement by which the latter company was obligated to maintain the ditch and keep it in repair. The respective boards of directors of the two defendant companies were composed in part of the same persons, the Larimer and Weld company electing a majority of the board of directors of the Cache la Poudre company. In response to the foregoing offer, which was in writing, the Larimer and Weld company wrote a letter to plaintiffs, which was by them understood as an acceptance

of the offer. This understanding is clearly shown by the following letter, dated June 3, 1907, addressed by plaintiffs to The Larimer and Weld Reservoir Company:

"Fort Collins, Colorado, June 3, 1907.

Larimer and Weld Reservoir Co., Eaton, Colo.

Gentlemen: I have the letter of 3rd ult, from your Sec., Mr. Freeman, informing me of the action of your board taking an interest in the cement dam we have recently finished in the Poudre river.

I notified our respective companies as to your request. It will give your ditch the same service as though you owned the entire dam, and we are pleased to have you take an interest in it, as it will somewhat lighten the burden on our company.

We have the dam all finished and paid for. So whenever your company can arrange to send us the $1,000.00 as per arrangement, it will be thankfully received, as we had to borrow some at the bank.

Yours very truly,

WATSON ZIEGLER,
Pres. No. 2 Canal."

After said letter, and pursuant to the arrangement therein mentioned, the Larimer and Weld Company paid to plaintiffs the sum of $400, receipt of which was acknowledged by plaintiffs, with request to arrange for the payment of the balance of $600, which sum, however, was never paid. The $400 payment was made after the dam was completed. When the dam was completed, the level of the water in the stream was raised so as to cause the water to flow into the defendant's headgates more readily than it had before the dam was built. Thereafter, plaintiffs cut out a portion of the crest of the dam so as to lower the level of the stream and change the current to some extent. In the fall of 1910, defendants placed new headgates in the north bank of the stream, immediately above and connecting with the north end of plaintiffs' dam, and in

so doing cut through and removed a portion of the plaintiffs' dyke, constructed substantial concrete walls, the lower portion of which was set against and transversely to the north end of the defendants' dam. Into these concrete walls, steel headgates were set, and the waters from said streams have ever since been diverted at and through such headgates by defendants and for their use.

This suit was brought by the plaintiffs in error to obtain a preliminary injunction restraining the defendants from taking possession of or interfering with the dam of the plaintiffs; for judgment permanently enjoining the defendants from utilizing defendants' dam and diverting the waters of said stream thereby, or changing their point of diversion; and for damages in the sum of $1,000 alleged to have been sustained by the acts of defendants prior to the beginning of the suit. Prayer for temporary injunction was denied, and defendants proceeded with the construction of and completed their new headgates and ditch, and up to the time of trial remained in possession of and utilized the plaintiffs' dam for the diversion of the waters aforesaid. On trial before the court, without jury, plaintiffs were awarded damages in the sum of $400, and the injunctive relief prayed for was denied.

1. It is conceded that the dam in question, and its lateral dyke or wall, were constructed by the plaintiffs, and, except for the negotiations mentioned, were their property, and were thereafter in the exclusive and uninterrupted possession of plaintiffs, until entered upon by the defendants in the fall of 1910, immediately prior to the beginning of this suit. It is not shown whether these structures were on public domain, or upon lands the title of which had passed from the government; but we think the ultimate title of the lands constituting the site of these structures is not material in this case, so long as it does not appear that the title was in the defendants. Plaintiffs owned the structures, and were in possession thereof. The law does not recognize a right in one to go upon land in the possession of another, and, taking pos-

session thereof, to build a structure thereon without the latter's consent and against his wishes. Such a rule would tend to invite a breach of the peace, and legalize force and violence. An entry in such case must be made under proper judicial authority.—*Larimer & Weld Irr. Co. v. Landers,* 23 Colo. App. 84, 141 Pac. 517, 519. Neither the acts of congress relative to public domain, nor the statutes of the state relative to irrigation, both of which recognize and grant a right to enter the public streams for the purpose of diverting water for irrigation, permit an entry upon or taking possession of the irrigation works of another without consent or appropriate proceedings at law. No judicial proceeding was instituted by defendants, and their acts in invading the possession of the plaintiffs can only be justified, if at all, by the negotiations hereinbefore mentioned, by virtue of which defendants paid, and the plaintiffs received and retained, $400 toward the cost of construction of said dam. Defendants, in justification of their acts complained of, allege that they had an interest in the said dam by virtue of certain negotiations between the plaintiffs and defendants, pursuant to which $400 was paid and retained; but both parties seem to have sought to avoid the obvious and necessary results of such negotiations if the acts of the defendants, as shown by the evidence, constituted an acceptance of the offer made. Defendants also pleaded the act of plaintiffs in cutting down the crest of the dam as a justification for changing their point of diversion, but neither asked for damages nor recoupment from the stipulated purchase price of an interest in the dam, nor did they offer proof that damage had been sustained. The trial court did not specifically find or hold that the offer, as a whole, had been accepted, but, upon a finding that some interest in the dam had been acquired by defendants by the payment and acceptance of $400, held that plaintiffs were estopped from asking for injunctive relief.

2. We think the evidence establishes an acceptance by The Larimer and Weld Reservoir Company of the offer made by the plaintiffs, and part payment made pursuant thereto,

notwithstanding the denial made during the trial that defendants had made a definite contract to pay the additional sum of $600. That such was the understanding of the plaintiffs, and that the payment was a condition precedent to the acquirement of an interest in the dam, is clearly shown by the evidence, and such understanding was not denied by the defendants. Without any other justification in law or equity, they took possession of the plaintiffs' works and utilized them, and in defense of this action pleaded the payment aforesaid, which had no other basis or consideration than the offer aforesaid and its acceptance. We think they are now estopped from denying that they accepted the offer as it was made; and that before they were entitled to take possession of the dam, or interfere with plaintiffs' possession and control thereof, they were required to pay the balance of the amount, upon payment of which they would have had full right and authority to utilize the dam by placing headgates therein for the diversion of their water. Such offer was never withdrawn by the plaintiffs. It is difficult to see how defendants can escape this conclusion, without pleading or admitting trespass; and, surely, they should not be allowed to successfully interpose such a defense.

3. The amount allowed by the court as damages was founded upon evidence that it would require that amount to place the lateral dyke or wall in as good condition for the protection of the dam as it was before the defendants made the breach therein, and failure to restore the dyke to its former condition of efficiency was a proper subject for damages, without regard to the contractual relations constituted by the foregoing offer and its acceptance.

4. The most serious legal question presented is whether the court should be sustained in denying all injunctive relief. It is possible that plaintiffs had an adequate remedy at law, by action for the balance of the purchase price of an interest in the dam under the contract, and for damages; but it is not unusual for courts of equity to interfere by injunction in aid

of possession of real property when the title of the person in possession is established, or not disputed, or where defendants attempt or threaten to take possession without right or authority of law, as, for instance, before payment of the appraised value of improvements made thereon, without which payment they would not be entitled to possession, or where, upon condemnation proceedings compensation has been awarded, but not paid; or where no proceedings for awarding compensation have been taken. In such cases, injunction is conditionally granted against the taking of possession until compensation is paid or condemnation proceedings instituted. High on Injunc. (4th Ed), §§ 356, 429a, 830-832; *Leighton v. Young*, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; *Harrington v. St. Paul & Sioux City R. Co.*, 17 Minn. 215 (Gil. 188); *Mayor, etc., v. Georgia R. & B. Co.*, 40 Ga. 471; *Stewart's Appeal*, 56 Pa. 413; *Conway et al., Ex parte*, 4 Ark. 302.

Moreover, the acts of defendants in taking and retaining possession of plaintiffs' works, if trespass, constituted a continuing trespass which threatened to ripen into a permanent easement, for which injunction will lie, although no actual substantial damage is shown. High on Injunc., Vol. 1, p. 671; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757; *Mott v. Ewing*, 90 Cal. 231, 27 Pac. 194; *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113; *Boglino v. Giorgetta*, 20 Colo. App. 338, 78 Pac. 612; *Walker v. Emerson*, 89 Cal. 456. 26 Pac. 968.

We think the defendants should have been restrained from taking possession of, or, after taking possession, from utilizing the dam and other works of the plaintiffs until they had made payment of the amount, payment of which was a condition precedent to defendants' taking advantage of plaintiffs' consent to so possess and utilize their works. Under the circumstances disclosed, we perceive no necessity for relegating the plaintiffs in this case to another suit or forum for a

complete determination of all matters fairly raised by the pleadings, and in issue.

The judgment of the court, awarding damages to the plaintiffs, and denying plaintiffs' prayer for injunction against the right of defendants to change point of diversion, is affirmed. The judgment, so far as it denied a conditional restraining order, is reversed, and the cause remanded, with instructions to the trial court to enjoin and restrain the defendants from utilizing their headgates in the plaintiffs' dam for the diversion of water, until they shall have paid to plaintiffs, or deposited in court for their use, the sum of $600, with interest from December 1, 1910; each party to pay its own costs, both in this court and in the trial court.

Reversed in part, affirmed in part.

[No. 3911.]

REYER, ET AL. v. BLAISDELL.

1. ACTION—*Legal or Equitable.* Where, upon the facts alleged in the complaint, a money judgment affords full relief, allegations of fraud, abuse of confidence and the like, do not have the effect to convert the cause into one of the equitable jurisdiction. It is still to be regarded as an action at law, though equitable relief is prayed. (393)

2. PLEADINGS—*Frame of Complaint—Prayer.* Plaintiff is entitled to such relief as the facts alleged and established warrant, regardless of the prayer, or the frame of the complaint. (394)

3. PARTIES—*Misjoinder of Plaintiffs—Effect.* Under the code the fact that one of those joined as plaintiffs has no right does not defeat even an action at law. Those entitled may have judgment, the cause being dismissed as to the other plaintiff, or judgment given against him if the facts demand it. (403)

4. JUDGMENT—*Rights of Several.* It seems from Jones v. Perot, 19 Colo. 141, that the ultimate rights of the parties between themselves, respectively, may be determined in one judgment, whether they have equal or different interests in the subject matter of the litigation. (404)

5. FRAUD—*Remedies.* Defendant having acquired from the owners of certain mining claims, situate in the State of Nevada, a bond for deed, or an agreement of sale therefor, for the price of $625.00, represented to plaintiffs that the claims were of immense value and could be purchased, but named the price at $25,000. Plaintiffs all resided in Penn-

sylvania, but had been associated in business with defendant, and he enjoyed their absolute confidence. One of them only, through whom defendant corresponded, and who played the part of a stool pigeon, knew the facts.. Acting upon defendant's representations plaintiffs agreed with him for the purchase of the mining claims on joint account of all parties. The sum of $25,000 was raised upon the joint note and remitted to the plaintiff, who consummated the purchase, paying for the property the sum of $625.00 and retaining the residue, except a portion thereof, which he paid to his confederate. *Held* that defendant held the difference between the two sums as trustee for plaintiffs; that upon discovery of the fraud plaintiffs might have repudiated the entire transaction, placed defendant in *statu quo,* and sued in tort for their damages; or might waive the tort and bring an action in the nature of *indebitatus assumpsit,* to recover the excess in defendant's' hands. (407)

Held, further, that the confederate, by whose aid in conducting the correspondence defendant was enabled to accomplish the fraud, was liable to the innocent plaintiffs for whatever of the proceeds of the fraud had come to his hands, even though he made no representations as of his own knowledge, but only served as the emissary of defendant to convey the false representations of the latter to his associates. (407)

Held, further, that the form of the action against him was of no moment. (408)

6. CONTRACT—*By Correspondence. Held,* in the same case that defendant's letters to his confederate, by means of which plaintiffs were deceived and misled, some of which letters the confederate was instructed to exhibit to plaintiffs, and in others of which it was left to his discretion to exhibit or with-hold them, created contractual relations between defendant and the injured plaintiffs, with the same effect as if defendant had corresponded directly with the latter. (408)

7. WAIVER—*Of Order Dissolving Attachment.* Defendant having obtained an order dissolving an attachment afterwards stipulated that the issues in the main cause, as well as those framed upon the traverse of the affidavit in attachment should be tried at the same time. *Held,* that he thereby waived the order dissolving the attachment, and all rights thereunder. (409, 410)

8. EVIDENCE—*Presumptions.* And the presumption was indulged that the traverse had been duly filed, though nowhere appearing in the record. (410)

9. ATTACHMENT—*Erroneous Dissolution.* Plaintiff's action, being in the nature of *indebitatus assumpsit* for money obtained by fraud, and the complaint being sustained by sufficient evidence, a dissolution of the attachment is reversible error. (410, 411)

10. APPEAL AND ERROR—*Documentary Evidence—Effect.* The evidence establishing plaintiff's right, being entirely documentary, the court entered judgment according to its own view of the matter. (411, 412)

Error to Denver District Court. HON. GEORGE W. ALLEN, Judge.

MR. NORTON MONTGOMERY, MR. HORACE N. HAWKINS and ELIZABETH M. BROWN for plaintiffs in error.

MESSRS. VAN CISE, GRANT & VAN CISE, MR. JOHN T. BOTTOM, MR. MILNOR E. GLEAVES for defendant in error.

HURLBUT, J., rendered the opinion of the court.

September 24, 1909, plaintiffs in error as plaintiffs below brought this action against defendant in error. The prayer of the complaint aks for judgment in the sum of $22,089.70; and also for general equitable relief. A writ of attachment was sued out in aid of the action and levy made on defendant's property. The case was tried to the court and it found for defendant, dismissing the action and dissolving the attachment.

The controlling object of the action, as appears from the complaint, is to recover from defendant the sum above specified. The complaint states in substance that in July, 1907, plaintiffs remitted to defendant the sum of $25,000 for the express purpose of purchasing a group of five mining claims in the Round Mountain mining district, state of Nevada; that defendant represented to them he was obliged to pay $25,000 for said claims, while in truth and in fact he only paid $625 therefor; that it was agreed and understood by all the plaintiffs and one Moyer (deceased), as well as defendant, that the claims were to be purchased by them all, for their common interest and benefit; that plaintiffs reposed absolute confidence and trust in defendant to make the purchase and complete the transaction, for the common benefit of all; that for a long time prior to the purchase of the claims plaintiffs and said Moyer had been interested with defendant in mining operations in Boulder county, Colorado, and that in such operations defendant acted for and represented plaintiffs, which fact, as alleged, caused plaintiffs to repose full confidence and trust in defendant to negotiate and make the purchase aforesaid; that at all times plaintiffs were residents of the state of Pennsylvania, and defendant of the state of Colorado; that in June, 1907, defendant went from Colorado to said Round Mountain district and made an examination of the claims purchased,

and thereafter represented to plaintiffs that he could procure an option to purchase the claims for the sum of $25,000, that they were very rich in gold, and that if plaintiffs and Moyer would join him in raising that amount they would all become owners thereof with him; that they relied implicitly upon the statements made by defendant in that behalf, and associated themselves together with him and raised the $25,000; that in order to raise said amount, all the plaintiffs, Moyer, and defendant, joined in the execution of promissory notes in that amount; that the representations of defendant as to the amount of the purchase price were wholly false, and defendant knew them to be false when he made them; that instead of paying $25,000 for the five claims, he only paid $625 therefor, and converted the balance to his own use. It is also alleged that after the purchase defendant paid upon said promissory notes of $25,000 the sum of $2,285.30, which plaintiffs concede should be credited to defendant, as well as $625 which defendant paid for the claims as aforesaid. It is further alleged that in the misrepresentations made by defendant concerning the price paid for the claims defendant was guilty of fraud and wilful deceit, and that they were made for the purpose of deceiving plaintiffs and Moyer, and did in fact deceive them. An amendment to the complaint was filed, containing a full narrative of the maturity and renewals of said $25,000 notes, and averring that upon the maturity of the last renewal thereof plaintiffs and Moyer fully paid and discharged the same.

After a number of demurrers and motions on behalf of defendant were disposed of by the court, defendant filed his answer denying any fraudulent or wrongful acts on his part, or any false representations by him concerning the transaction in question. The answer admits, however, the receipt of the $25,000 by defendant as alleged in the complaint, but claims as a defense that plaintiffs were buying the property from him as an individual, at the agreed price of $25,000; further alleging that there was no agreement or understanding between

plaintiffs and defendant that the claims were to be purchased by them for the common benefit of all. Replication was duly filed.

Although the pleadings are somewhat lengthy, we think the above statement shows in a general way the issues upon which the litigation is predicated. The entire transaction, including the alleged fraud, misrepresentations and deceit of defendant, which culminated in the remittance of the $25,000 to defendant, and the purchase of the five claims by him, is shown and established by documentary evidence consisting of about one hundred letters and fifteen telegrams, which passed between defendant and plaintiff Barton between May and November, 1907.

At the trial defendant Blaisdell, plaintiffs Reyer and Barton, and one Nels Paulson, testified as witnesses, defendant being the only witness who appears to have testified for the defense. We will not attempt to comment in detail upon the evidence that appears in this ponderous record, but will say that we have read it all carefully, and have arrived at the conclusion that, taking it altogether and making allowance for some unimportant discrepancies, the actions, telegrams and letters, of defendant, establish moral turpitude on his part in the negotiation and purchase of the claims, and in obtaining the $25,000 remitted by plaintiffs. In our judgment they show that defendant deliberately planned and conspired with plaintiff Barton to wrongfully and fraudulently obtain from plaintiffs (exclusive of Barton) a large part of the said $25,000.

Earnest effort is made by counsel for defendant in error in their brief to convince this court that Blaisdell was an innocent party, acting in perfect good faith with plaintiffs; that he held an option on the claims for something like $700 or $800 in his own name and right, and was dealing at arm's length with plaintiffs, as purchasers of the claims from himself as an individual. We thinks the contents of the above mentioned letters and telegrams destroy every vestige of defend-

ant's contention in this behalf. They appear to conclusively establish the fact that the purchase was made for the common benefit of all the plaintiffs, Moyer, and defendant, and was so intended, understood and agreed, by and between them. The record further discloses that considerable skill and ingenuity were exercised on the part of defendant and Barton, to prevent plaintiffs (exclusive of Barton) from knowing or ascertaining the actual purchase price of these claims from the owners, and they were so successful in that regard that plaintiffs did not become aware that the real purchase price of the property was only $625, instead of $25,000, until sometime in August, 1909, over two years after plaintiffs had paid that sum to defendant.

It would serve no good purpose to attempt to analyze the evidence in detail in order to support the conclusions we have reached on the merits. We are satisfied that the record entirely supports the plaintiffs' cause of action on the merits, and disproves defendant's attempted defense.

Returning now to the proceedings in the District Court, it may be observed that the trial judge did not assume to decide the merits of the case, although he rendered a lengthy opinion containing his reasons for dismissing the action. In brief, he based his judgment of dismissal entirely upon the ground that Barton participated in whatever fraud or deception the defendant may have perpetrated upon plaintiffs, and that Barton and defendant stood, in relation to each other, *in pari delicto;* that Barton, as a joint plaintiff, therefore could not recover from defendant; that plaintiffs were joint plaintiffs, and all must recover or none; thus adopting the rigid common law rule as to joint plaintiffs in a law action. The court further held that neither § 222, Mills' Annotated Code, nor any other section thereof, was applicable to the case made by the record; that the section applies only to cases wherein it appears from the record or at the trial that a plaintiff suing jointly has no interest in the recovery, in which case he may be eliminated and judgment go for his co-plaintiffs.

In view of the rulings of the trial court in dismissing the action as stated, it becomes necessary to consider and determine whether or not its ruling in that behalf is supported by the law. The complaint on its face purports to state but one cause of action, although divided into a number of paragraphs. It states in rather a concise manner the cause of action, and closes with a prayer for a money judgment, followed by one for general equitable relief. It shows that defendant holds in his possession $22,089.70, which rightfully and justly belongs to the plaintiffs. The facts there pleaded characterize the case as an action at law to recover money in defendant's hands which rightfully belongs to plaintiffs. In form it is somewhat analogous to the common law action of *indebitatus assumpsit* for money had and received, the promise to repay being implied. The complaint contains no substantial averments calling for equitable intervention. Full relief can be had by a money judgment. True, the complaint contains a number of averments alleging fraud, false representations, and deceit, on the part of defendant in the obtaining of the $25,000, and in making the purchase, but such averments are those ordinarily found in an action of law wherein a defendant is charged with moral turpitude in obtaining and retaining money justly belonging to plaintiffs, but they do not change the character or nature of the action from one essentially legal to one in equity.

Under the reformed procedure under the codes the question here presented has received earnest and serious consideration from the various appellate courts of the country, as well as the standard law writers. Mr. Pomeroy, in his work on Code Remedies, fourth edition, has devoted unstinted space to a profound and scholarly discussion of changes made in the common law by the codes of the various states relative to the joint relations of plaintiffs and defendants in civil actions. Practically all the code states, including our own, have decided beyond debate that codes analogous to our own, which in terms abolish the distinction between forms of action, do not

abolish the principles underlying various actions, existing prior to the adoption of the code. Under this procedure, however, a party need only state facts upon which he relies to sustain his cause of action, and if issue be taken thereon he will be entitled to such a judgment as the facts established show him entitled to, regardless of the form of action which the pleadings might disclose. In the work last mentioned the author, at page 167, after a lucid discussion of the changes wrought in the common law, by the codes, concerning joint rights and liabilities of plaintiffs and defendants, recapitulates his conclusions in six paragraphs, the third of which reads as follows:

"The new system has, in a very comprehensive form, established the doctrine of equity in regard to the choice and joinder of plaintiffs, and, by making no exceptions or limitations, has applied this doctrine to all actions, whether legal or equitable;"

and at page 175:

"That these provisions as to the parties plaintiff do enact the general doctrines which had prevailed in courts of equity, is admitted by both schools of interpretation; and that these equitable rules, thus embodied in a statutory form, do apply to all actions, and are not by any implied limitation restricted to equitable actions, is now, I think, declared by the courts in most of the states which have adopted the reformed procedure;"

also at page 182:

"Has any change in these conceptions, and in the practical rules derived from them, been wrought by the codes of procedure? If the old distinction between joint legal rights and several rights is maintained; if the ancient notion of the common law, that two or more parties plaintiff in a legal action, brought upon a contract or upon the ownership of land or chattels, must hold a joint cause of action, is still preserved,

with all of its technical incidents; if it be considered that the reform legislation has confined its equitable doctrine as to parties to equitable actions alone, while it has left the doctrines regulating legal actions untouched—then no change has been wrought in the practical rules which determine the effect of a misjoinder of plaintiffs, as stated in the foregoing paragraph. Under this assumption, a misjoinder of plaintiffs in a legal action, brought upon a contract or upon property in lands or chattels, must now, as formerly, entail the consequence of a complete failure; while now, as formerly, a misjoinder of plaintiffs in an equity suit does not entail such a consequence; a judgment can be recovered by a portion of the plaintiffs, and the action be dismissed as to the residue. If, on the other hand, the system is to be accepted and acted upon in the spirit which designed it—if its requirements as to parties, which, as is universally conceded, enact the established doctrines of the equity courts, extend the one principle to all actions, legal as well as equitable—then there is a single rule governing all actions, and, so far as the dogmas of the common law are inconsistent therewith, they are necessarily abrogated, and form no part of the reformed American procedure. * * * Are these provisions of the code to be accepted in their entirety, with all their legitimate and necessary consequences, or are they to be limited and restricted by some exception grafted upon them by the courts, and are their consequences to be abridged and their operation to be confined to those actions which, under the former system, would have been called equitable? I have already, in the former portion of this section, stated, as the guiding principle of interpretation adopted by most of the courts, the doctrine that the equitable rules of the codes were to be applied in all actions, whatever be their nature."

The Supreme Court of Wisconsin seems to approve the author's conclusions. *Castle v. Madison,* 113 Wis. 346, 89 N. W. 156. The citations I have hereinbefore made from Pom-

eroy are taken from his discussion of the following code provisions which are found in most of the states, viz:

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title."

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

It seems clear from the author's discussion of the code provisions concerning the question under consideration that if the plain and ordinary meaning be given to the language used by the legislatures, the reformed procedure applies to legal and equitable actions alike. This construction abolishes the harsh common law rule that if an action at law be brought by two or more plaintiffs and one fails to establish a right of recovery, all his co-plaintiffs must likewise fail and be denied recovery, although it should clearly appear that his co-plaintiffs have suffered damage from the defendant and are entitled to relief.

Mr. Bliss, in his work on Code Pleadings, third edition, seems to agree generally with the views expressed by Mr. Pomeroy upon the construction that should be given to legislative acts adopting the reformed procedure relative to joint relations of parties to civil actions. Section 24 reads in part as follows:

"At common law, in a joint action, if one of the plaintiffs fails to show his right of action, there can be no recovery by the others; hence the declaration must show a joint right, one that exists in favor of all the plaintiffs. But under the new system, the equity rule which permits 'all persons having an interest in the subject of the action and the relief' to be joined as plaintiffs, is adopted in terms, and judgment may be given in favor of one or more of the plaintiffs and against the others. In a case like the one just noted, if two or more ten-

ants in common who derive title from the same person and by the same instrument, seek to repudiate the purchase or recover damages upon the ground of fraudulent representations which induce it, and so state the facts that they apply to each purchaser, under these provisions of the statute it would seem that they should be permitted to join in the action; and if it should appear that one or more of the plaintiffs knew the facts and did not rely upon the representations, the judgment might be against him or them, although in favor of the others. But this question has not been authoritatively decided."

While the last phrase of the quotation indicates that his expressed views are not entirely settled by the authorities, many cases, some of which I will hereinafter cite, seem to be in full accord with such views.

Section 74 reads:

"It shocks the prejudices of common law pleaders to speak of a union of plaintiffs where there is not a joint interest; and, such is the effect of a legal education, and long habits of thinking, that, what seems so natural in a proceeding to prevent a common injury, or to set aside a sale for the benefit of common creditors, or to subject to their respective claims the assets of an estate, seems almost impossible, in case a sum of money is sought to be recovered in which sundry persons have a several, and perhaps unequal, interest.

"But it has come to be generally conceded that the rule is universal in its application, as it is in its terms; and if two or more are interested in the subject of the action, and in the relief sought, they may unite as plaintiffs for the recovery of money, or of specific real or personal property. The objection to the union springs from the difficulty in common law actions in adjusting the rights of the plaintiffs as between themselves. In such actions this cannot be done; but the code removes the objection by adopting another rule of equity practice, to-wit: 'Judgment may be given for or against one

or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side as between themselves; and it may grant to a defendant any affirmative relief to which he may be entitled.' Notwithstanding this rule, it is said, and with apparent reason, that such adjustment is difficult, and sometimes impossible, in jury trials. But the suggestion supposes that the several rights will always be ascertained by the verdict. While in many cases this may be done, and must be done when the extent of the liability depends upon the amount of each of the several claims, yet in other cases, the verdict need only find the fact of the defendant's liability, and its amount, leaving the adjustment among the plaintiffs to be made by themselves after judgment, or by the court before it is entered."

In section 61 the author says:

"The statutory provisions in regard to the joinder of plaintiffs are (1) permissive and (2) imperative. The following is the first: 'All persons having an interest in the subject of the action and in obtaining the relief demanded, may join as plaintiffs, except as otherwise provided,' etc. This provision is followed by (the second) to-wit, that 'the parties who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made defendant, the reason therefor being stated in the complaint' (or petition). These two provisions are familiar to equity pleaders. But though drawn from equity practice, it must not be hence inferred that they apply only to actions for equitable relief; for, as we have seen, and shall all along see, the chief changes made by the code consist in applying to pleadings in all actions, rules otherwise recognized in courts of equity."

Section 72 reads in part as follows:

"It should be premised that the supposed innovations by the code are rules of equity procedure. * * * but the

statute does not confine them to any class of actions; they are general in their character, and are applied to all actions; there is now but one form of action and mere formal distinctions between those heretofore called legal and those called equitable are abolished. Bearing this in mind, the conclusion is inevitable that these rules apply as well to one class of actions as to the other, unless from their nature such application cannot be made."

Again at section 73, speaking of permissive joinder, the author says:

"There is a distinction between the rule requiring persons united in interest to be joined and the one just given, as the latter does not contemplate a joint interest, nor is the union made imperative. In the cases where it has been sanctioned the interest is called a common one—that is, certain persons are interested in that concerning which the wrong has been done, and will all be benefited by the relief which is sought; they have a common interest, and may join in seeking relief. Thus, the owners of distinct parcels of property may be interested in setting aside a fraudulent conveyance; and tenants in common, though holding in severalty, may be interested in preventing a trespass. In either case they may unite in an action, notwithstanding the technical common law rule confining the union to those having a joint interest."

In speaking of the joint rights of joint obligees, it is said in section 62:

"As, in legal progress, the individual interests of each obligee came to be recognized, the notion of a joint right became but a fiction. As a fact, it ceased, and should have been treated as merged into—as having become but a right in common—analogous to tenants in common in the realty."

See also: *Loomis et al. v. Brown et al.,* 16 Barb. (N. Y.) 325; *Seymour v. Carpenter,* 51 Wis. 413, 8 N. W. 251; *Schiffer, Admr. et al. v. City of Eau Claire,* 51 Wis. 385, 8 N. W. 253; *Goodnight v. Goar,* 30 Ind. 418; *Meldrim et al v. The United States,* 7 Court of Claims 595; *Earle v. Burch,* 21

Neb. 702, 33 N. W. 254; *Bestor v. Barker,* 106 Ala. 240, 17 So. 389.

Section 222, Mills' Annotated Code, reads as follows:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

Indiana has a code section identical with ours, and the appellate courts of that state have time and again construed the same. *Nichodemus v. Simons et al.,* 121 Ind. 564, 23 N. E. 521, was an action for money had and received, brought by two plaintiffs against defendant. The complaint on its face alleged a joint cause of action, and it appeared at the trial that upon the facts alleged in the complaint some of the plaintiffs, but not all, were entitled to recover. The court held that judgment could be rendered for the plaintiff entitled to recover, although the remaining plaintiff failed to prove right of recovery. The court said:

"In our code of practice is found the following statute: (quoting statute identical with above section). This is a very liberal statute, and is in accord with the spirit of the code of which it is a part. (Section 568, R. S. 1881.)

"It has been often said by this court that the code of practice was formulated and adopted with the view of simplifying the rules of practice in our courts, and doing away with all technicalities, the only effect of which was to obstruct the administration of justice in the trial of causes. Keeping in mind the language of the said section of the statute, and the spirit of the code in which we find it, we can but come to the conclusion that it was the intention of the law-giving power by the enactment of said section, in all actions having more than one party plaintiff or more than one party defendant, to confer upon the courts power to brush aside all technical objections which disregard what is substantive, and

depend upon mere form, and to render judgment according to the rights of the parties as disclosed by the evidence and embraced within the subject-matter covered by the issues tendered.

"If, therefore, two or more persons bring a joint action, alleging a joint cause of action, and it turns out upon the trial that upon the facts alleged in the complaint some, but not all, of the plaintiffs are entitled to recover, the court or jury, as the case may be, will so find, and judgment will be rendered accordingly. And where a number of defendants are sued, and after the evidence is heard it appears that there ought to be a recovery as to some but not all of the defendants, the court or jury may so find, and judgment will be thus rendered.

"This has been the construction given to the provisions of the said statute, when brought in question before this court, without exception" (citing many Indiana cases).

To the same effect: *Rust et al. v. Thompson et al.*, 112 Ind. 158, 13 N. E. 665; *Hamilton et al. v. Browning et al.*, 94 Ind. 242; *L. N. A. & C. R. Co. v. Lange, et al.*, 13 Ind. App. 337, 41 N. E. 609; *Ward et al. v. Gibbs et al.*, 10 Tex. Civ. App. 287, 30 S. W. 1125; *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523.

From Enc. of Pl. & Pr., page 539, we quote the following:

"In actions upon implied contracts the right of action follows the consideration."

"Where a promise is implied, the action must follow the consideration, and be joint or several accordingly; but where the action arises on an express promise, if that be joint, the action must be. *Lee v. Gibbons*, 14 S. & R. (Pa.) 105."

In the case at bar there can be no question, under the evidence, that all the plaintiffs, Moyer, and defendant, joined in a common venture to purchase the mining claims for the common benefit of all, and that plaintiffs entrusted defendant with the authority to purchase the claims at the best price obtainable, which defendant represented to be $25,000; that a

highly fiduciary relationship existed between plaintiffs (exclusive of Barton) and Moyer on the one hand, and defendant on the other. At all times during the negotiation and purchase the respective parties were separated by two thousand miles of territory, and for a long time prior to the purchase plaintiffs had been in close business relations with defendant, who represented their interests in certain mining operations in Colorado. They therefore knew him well, and presumably had perfect faith and confidence in him. It is unreasonable to presume that plaintiffs would have entrusted a stranger, or one in whom they reposed no confidence, with the large sum of $25,000, with full authority to dispose of the same in the purchase of said five claims. Plaintiffs relied exclusively upon the honor and judgment of defendant to fix the value of such claims. Under the circumstances, if defendant purchased the claims for $625, instead of $25,000, it is too clear for argument that the difference between the two sums rightfully belonged to plaintiffs, and defendant held same in trust for them. It is also clear that upon discovery of the deception practiced upon them plaintiffs could have repudiated the entire transaction, placed defendant in *statu quo,* and sued in tort to recover their damages; or they could have waived the tort, confirmed defendant's acts, and brought an action in the nature of *indebitatus assumpsit* for money had and received, to recover the excess in defendant's hands. The complaint indicates that they pursued the latter course and adopted defendant's acts in purchasing the claims, received the title thereto, and by this action seek to obtain the balance in his hands which justly belongs to them.

In *Meldrim v. The United States, supra,* two plaintiffs, joint owners of property, brought an action to recover the value of certain cotton which had been captured by the government. At the trial one of the plaintiffs failed to show his loyalty, which prevented him from recovering. The other did so, and judgment was rendered in his favor for the interest he owned in the property. The court said:

"If at the common law, under the principle announced in *Fain's Case,* joint owners of property can maintain separate suits when their interest is several, much more ought they to be able to do so in this court, whose jurisdiction is purely statutory and limited by no technical forms or rules of pleading. Its object is, in this class of cases, to determine the right of every claimant under the statute to the proceeds of his property seized, and to render judgment accordingly. And in a case like this, when the interest is not equal but clearly severable, the court will ever be cautious not to allow the crime of one joint owner to work a forfeiture of the rights of the other when he is innocent and within the terms of the statute."

So it may be said in the case at bar. We see no good reason under the liberal provisions of the code, why the honest plaintiffs may not recover against the defendant the money belonging to them and in defendant's hands, if they prove such right under the allegations of the pleadings, although the evidence shows that the plaintiff Barton was not entitled to recover, by reason of participation in the false representations and pretenses made to his co-plaintiffs. The plaintiffs (exclusive of Barton) had a common interest in the fund sought to be recovered. The record does not clearly show whether or not all the plaintiffs, Moyer, and defendant, who signed the original notes for $25,000, were each to be liable for one-ninth of the total, nor does it show just what part of the total sum each paid. The notes on their face are joint and several and bind each and all to the full amount thereof, but it might be that, as between themselves and defendant, they contributed different amounts to the sum total. The record shows that defendant Blaisdell, subsequent to signing the notes, was released from liability on some of them, because of his payment of a part thereof, it being stated that such payments were his *proportionate share* of the same. An inference might be drawn from this that there was an understanding between the signers that each might secure his release from the notes

by paying such part thereof as his share in the enterprise represented. Under said § 222, and other authorities cited, we do not think this important, as it appears to be well settled by such authorities that if all the plaintiffs under the pleadings show themselves entitled to an interest in the common fund sued for, the court at the trial may and should adjust and determine their respective interests therein and give judgment accordingly.

In *Jones v. Perot,* 19 Colo. 141, 34 Pac. 728, the court held the lower court to have committed error in sustaining a demurrer to the complaint, using this language:

"The court erred in sustaining the demurrer to this pleading. If the facts alleged are true, and they must be taken as true, as against the demurrer, the plaintiff Sutton had become jointly liable with defendant Cooper upon the agreement which constitutes the basis of the first cause of action as pleaded. The defense should have been permitted to stand, to the end that in this action the ultimate rights of the parties may be determined as between themselves, as provided by section 222 of the Civil Code."

It would appear that this decision recognizes the power of the trial court to determine the respective rights or interests of the parties as between themselves respectively, whether such parties have equal or different interests in the subject matter of the action.

Extended discussion on behalf of both parties has been indulged in in the briefs, concerning the character of this action and the respective rights of the parties under the common law and code provisions. We have already decided that this is essentially a law action upon an implied contract, and analogous to what was known at common law as an action in *indebitatus assumpsit* for money had and received.

In *Byxbie et al. v. Wood,* 24 N. Y. 607, being an action wherein plaintiffs sued defendant to recover money alleged to have been obtained by false and fraudulent representations

and statements, the facts of the case disclosed a situation quite similar to the one found in the case at bar. The court said:

"We are thus brought to the consideration of the chief ground taken on the part of the defendant, which is, that the cause of action, as laid in the complaint, was founded on fraud and deceit, and that such an action was for a tort of such a nature that the cause of action is not assignable. * * * The facts, as found by the referees are, that, by false representations and the alteration of bills and vouchers, the defendant himself received from Marvine large sums of money to which he was not entitled; and they have found that the plaintiffs are entitled to recover, not for any fraud, but for the money which the defendant had so received, and which, being so received, he had no right to retain. This state of facts does not necessarily require an action to be brought for the tort, even if it allows one to be so brought. Such facts always raised, in law, the implied promise which was the contract-cause of action in *indebitatus assumpsit* for money had and received. Having money that rightfully belongs to another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise; and the action always sounds in contract.

"Under the code this implied promise is treated as a fiction, and the facts (out of which the prior law raised the promise) are to be stated without any designation of a form of action; and the law gives such judgment as, being asked for, is appropriate to the facts. * * * The complaint says that Wood made false and fraudulent representations to Marvine about the moneys paid for joint account, and 'by means of such false representations fraudulently and deceitfully obtained' property, etc., from Marvine; and the plaintiffs (as assignees of Marvine) 'therefore demand judgment against the defendant for the sum of $6,559.62, and interest from October, 1848.' It would hardly seem that this is a complaint for a mere naked tort in an action claiming damages for the wrong. And unless it be so, necessarily and un-

avoidably, the ends of substantial justice would require us to disregard the words that charge a wrong.

"Yet even this seems not now a necessary ground for sustaining this judgment. What valid objection is there to treating these words ('fraudulently and by deceit') as mere inducement, containing a statement of the facts which show that Marvine's payment was not a voluntary one with knowledge of the facts, and that, therefore, he was entitled to sue to recover back the money; and thus anticipating a defense?

"The defendant's counsel claims that the findings of fact by the referee do not sustain the judgment, because they have not found the fraud, which is alleged in the complaint. It is quite true that they have not found the fact of fraud; but as we hold that the action is sustainable without there having been any fraud, and merely as an action for money, which the defendant has no right to retain, the failure to find fraud is no objection to the validity of the judgment, and it is to be affirmed as not being an action for the fraud"

In *Denver Tramway Co. v. Cloud,* 6 Colo. App. 445, 40 Pac. 779, Judge Bissell, in discussing the character of the action, as to whether it was an action in assumpsit or one in tort, spoke as follows:

"Under our system of pleading we have but one form of action, and when the pleader has stated the facts out of which his cause of action arises and supports that cause by proper proof, he may recover for the tort, even though he has stated facts which at the common law would of necessity make his action one in assumpsit and not in case. In other words, we are not willing to admit the existence of those technical distinctions which at the common law determined what action was brought and what relief the plaintiff might have."

We see no reason why, in Judge Bissell's illustration, the converse of the rule should not prevail, that is to say, plaintiff might recover in *indebitatus assumpsit* for money had and received even though he had pleaded facts which at common

law would of necessity have made his action one in tort. See also *The Union Bank v. Mott,* 27 N. Y. 633.

As to whether or not an action in the nature of one for money had and received is the proper kind of action to recover money from defendant under circumstances similar to those disclosed by this record, the general trend of the authorities supports the affirmative. The syllabus in *Mumford v. Wright,* 12 Colo. App. 214, 55 Pac. 744, reads in part as follows:

"Where a party receives the money of another and applies it to his own use, the law implies a promise to repay, and it is not necessary to allege such implied promise in an action to recover such money."

"Where money was paid into court and the clerk paid it out to a party who claimed it but who was not entitled to receive it an action could be maintained against the party who received the money by the party rightfully entitled to it, as for money had and received."

To the same effect *Brown's Estate v. Stair,* 25 Colo. App. 140, 136 Pac. 1003. This last cited case is in harmony with the authorities adopting the affirmative. The question, with some of its phases, is discussed at some length by Judge King, who, with his customary logic and clearness, supports the opinion of the court by cogent reasoning and by citation of reputable authority. See also *The Ph. Zang Brewing Co. v. Bernheim et al.,* 7 Colo. App. 528, 44 Pac. 380.

It is contended by defendant that all negotiations for the purchase of the five claims, the actual purchase thereof, as well as the securing of the $25,000 by him, took place between himself and plaintiff Barton alone; that defendant never had any dealings either in person or by letter with the other plaintiffs, therefore they had no cause of action against him. This may be literally true as to the facts stated, but it in no way helps defendant in his defense. The conclusion is false. The record shows that he used Barton as an instrument and worked in conjunction with him to get the other plaintiffs to join with himself and Barton in the purchase of the claims.

The record also shows that in the correspondence between defendant and Barton the former indited certain letters to the latter, with instructions to show them to the other plaintiffs; while in others he instructed Barton to use his own judgment as to whether or not he would show them. It further shows that the greater number of those letters were shown by Barton to the other plaintiffs, and were so used by him to induce them to engage in the venture. In law such actions by defendant and Barton established the contractual relations between defendant and the other plaintiffs with as much validity and binding force as would have been the case had defendant corresponded, concerning the matters, directly with the plaintiffs themselves. The contention of defendant, therefore, is not tenable.

The facts disclosed by the record show a situation that is frequently met with in common business affairs. The unwary are often importuned by unscrupulous persons to invest money in enterprises remote from their domicile, and of which they know nothing, but are, however, induced, and sometimes enthused, by highly colored prospects of fabulous profits, to not only make the investment, but to impose perfect confidence and trust in a skillful and persuasive promoter. The law is well settled that when one person induces another to join with him in a purchase of property under a plain understanding that such one is to secure the title at a stated price, and it turns out afterwards that the one intrusted in making the purchase secures it at a less price, he must account in law to the other for any excess he has procured from his co-purchaser over the actual price paid. The form of the action brought is of no moment if the facts alleged, and the proofs made, show that the one making the purchase retains such excess in his hands. It makes no difference in such case whether such one made false or fraudulent representations concerning the price paid, or remained silent and permitted his co-purchaser to believe that the price represented to have been paid was the true purchase price. A few cited cases in support of the rule will be

sufficient. *Mayo et al. v. Wahlgreen,* 9 Colo. App. 506, 50 Pac. 40; *Teachout v. Van Hoesen,* 76 Iowa 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. Rep. 206; *Bergeron v. Miles,* 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911; *Davenport v. Buchanan,* 6 S. D. 376, 61 N. W. 47; *Kennah v. Huston,* 15 Wash. 275, 46 Pac. 236; *King v. White,* 119 Ala. 429, 24 South 710. The facts of the last case cited are quite similar to those of the case at bar.

Under the evidence disclosed by the record, plaintiff Barton was not entitled to recover, by reason of his participation in the false representations and false pretenses practiced upon his co-plaintiffs in securing from them the money sued for. Under such circumstances the law will extend him no relief, but will leave him in the condition that it finds him; therefore the judgment of the trial court in favor of defendant as against him was properly rendered, but as to all his co-plaintiffs the finding and judgment against them in favor of defendant was erroneous. The judgment should have been for such co-plaintiffs.

We will now consider the action of the trial court in dissolving the attachment, based upon the issue formed by the traverse to the affidavit. Section 113, Mills' Annotated Code, provides among other things that before the time for answering expires, defendant may, upon motion and reasonable notice to plaintiff, have the attachment discharged "on the ground that the writ was improperly issued, for any reasons appearing upon the face of the papers and proceedings in the action." Bearing this section in mind, we call attention to two entries in the transcript of record, viz:

(1) November 8, 1909, an order, to the effect that the court, after hearing a motion of defendant to *discharge* the attachment, granted the same.

(2) On September 26, 1910, another order, to the effect that, after hearing a motion of defendant to *dissolve* the attachment, the same was granted. Just following this entry, and on the same day, appears another order to the effect that

defendant may have ten days in which to "traverse herein as he shall be advised."

After a careful search of the transcript in this case, as well as that of the intervention, we fail to find any motion whatever for discharge or dissolution of the attachment, or any traverse of the affidavit. However, we consider this of no importance, as the record shows that at the beginning of the trial of the main case, on February 17, 1911, it was stipulated by counsel for both parties that the issues in the main case, as well as those formed by the traverse of the affidavit, should be tried at the same time. This clearly indicates that the court and all the parties must have ignored both of the orders above cited, and that defendant waived any rights thereunder, and was content to test the validity of the attachment proceeding by trying the issue made by the traverse. Section 96, Mills' Annotated Code, among other things provides that "If the defendant fail to traverse the plaintiff's affidavit, the attachment shall be deemed sustained." Again we say that, both parties having stipulated that the evidence should be taken upon the traverse issue at the time of the hearing upon the main case, we will presume the traverse was filed. With this explanation we will proceed.

The trial court in its findings and judgment dissolved the attachment. Was this error? The affidavit among other things alleged as a ground of attachment that by false representations, false pretenses, and fraudulent conduct, defendant procured the money of plaintiffs in the manner stated. This alleged ground of attachment is substantially in the same words as those found in subdivision 12, section 92 of the code. Assuming then that the traverse was filed, we must also assume that this ground of attachment was therein denied. Therefore, having hereinbefore reached the conclusion that this is an action at law as for money had and received upon an implied contract to recover money in the possession of defendant which rightfully belongs to plaintiffs, and having also decided that the money sued for was obtained from plaintiffs

by and through false representations, false pretenses, and fraudulent conduct, of the defendant, it follows that the lower court committed reversible error in finding the issues upon the traverse in favor of defendant.

Section 91 of the code provides among other things that "The plaintiffs at the time of issuing the summons or filing the complaint in an action on contract, expressed or implied, or at any time afterward, before judgment, may have the property of the defendant not exempt from execution attached as security for any judgment that may be recovered," etc. The right to sue out a writ of attachment upon an implied contract, under statutes similar to ours, is sustained at page 442, 4th Cyc., many authorities being cited in support thereof.

Numerous other questions are raised and ably discussed by counsel for defendant in error, both upon matters pertaining to the main issues as well as those of the traverse, all of which have received careful consideration, but in view of the conclusions we have reached on the various questions determined, we discover nothing therein that causes us to doubt our position.

Inasmuch as the proofs tending to establish plaintiffs' cause of action consist entirely of documentary evidence, this court is warranted in passing upon the sufficiency thereof, irrespective of any findings or conclusions of the trial judge upon the issues. Therefore, having reached the conclusion that Barton's co-plaintiffs established their cause of action and right of recovery against defendant, we feel justified by the record in terminating this litigation now. The judgment of the district court will therefore be reversed, except as to plaintiff Barton, with instructions to hear evidence as to what part of the $25,000 each of the plaintiffs (exclusive of Barton) contributed thereto, and as to what expense was incurred by defendant in and about his journey from Colorado to Nevada and return, while making the examination and negotiating for the purchase of said claims, including any outlay made by him which was reasonably necessary in negotiating

and consummating the purchase; to which sum should be added the amount which may be found by the court to have been paid by defendant for the five claims—not less than $625 (admitted in the pleadings), — and the further sum of $2,285.30, admitted by plaintiffs to have been paid by defendant as part payment upon the said $25,000; which total so ascertained should be deducted from the $25,000, and judgment for the balance entered for plaintiffs (exclusive of Barton), with legal interest.

Reversed with instructions.

[No. 3828.]

HAPNEY ET AL. v. DUNN ET AL.

EJECTMENT—*The Value of Improvements Made by the Defendant* allowed to him under Rev. Stat. 5733 does not bear interest, prior to judgment. (416)

Appeal from Costilla District Court. HON. CHARLES C. HOLBROOK, Judge.

MR. JESSE STEPHENSON for appellants.

No appearance for appellees.

HURLBUT, J., rendered the opinion of the court.

Judgment affirmed.

This is a code action in the nature of ejectment, begun January 28, 1908. Plaintiffs below (appellees here) allege several causes of action against defendants. Issues were formed by the filing of answer and replication. The case was tried to the court without the intervention of a jury, and findings and judgment were in favor of plaintiffs.

Appellees have not appeared or filed any brief in this court. Appellants rely upon but one error, which is set out in the second assignment, viz:

"The court erred in not allowing interest at the rate of fifteen per cent per annum on the sum of $110, found to be due the defendant, Hapney, on account of improvements placed upon the land mentioned in his tax deed."

The abstract contains the pleadings, the findings and judgment, and a brief statement by the court that the value of the improvements placed upon the land by the defendants is $110; that defendants took possession of the land February 5, 1903, fixed the fences, kept them up, plowed out the ditches, and put some new windows in the house; and that such improvements were made April, 1906. The decree was entered February 27, 1911.

The determination of the appeal involves a construction of § 5733, Revised Statutes, 1908. The section reads as follows:

"No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding; Provided always, That when the owner or owners of such land, sold as aforesaid, shall at the time of the execution and delivery of the deed by the treasurer, be minor or minors, or insane or an idiot, and residing within the United States, one year after such disability is removed, it shall be lawful for such person or persons, heir, heirs or legal representatives, to bring their suits or action for the recovery of lands so sold, and when the recovery is effected, in all cases, the value of the improvements, etc., made on the land so sold, and all taxes paid after the sale thereof, with interest thereon at the rate of fifteen per cent per annum, shall be ascertained by the jury trying the action for the recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession of the land so recovered."

This statute first appeared at page 121, § 96, Session Laws of 1870, and has been retained (with changes to be noted) as part of our revenue law to the present time. As

passed in 1870 it provided that "No action for the recovery of lands sold for taxes shall lie unless the same be brought within five years after the sale thereof for taxes as aforesaid." It also contained the provision that "Where the recovery is effected in all cases the value of the improvements made on the land so sold, and all taxes paid after the sale thereof, with interest thereon, as provided by this act, shall be ascertained by the jury," etc. The section next appeared in the General Laws of 1877, at page 778, as § 96; next in the General Statutes of 1883, at page 861, as § 2934. The section as passed in 1870, and as it appeared in the General Laws of 1877 and General Statutes of 1883, is the same, with the exception of a few minor changes made by the legislature in the phraseology and punctuation. In 1885, however, the legislature repealed the section as it appeared in the General Laws of 1877, but re-enacted the same, in general terms, with two noticeable changes, viz: The section read, "No action for the recovery of lands sold for taxes shall lie unless the same be brought within five years after the sale thereof for taxes as aforesaid." It was changed to read, "No action for the recovery of lands sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer." Also the words, "as provided by this act" were eliminated and the words "at the rate of fifteen per cent per annum" substituted therefor. Session Laws, 1885, page 320. The section as amended by the legislature next appears as § 3904, Mills' Annotated Statutes, 1891.

In the extra session of the Thirteenth General Assembly, 1902, the revenue laws, by an act of that body, were extensively revised, and the section as it appears in Mills' was substantially re-enacted. Section 185, page 139, Session Laws (extra session) 1902. Its final appearance is in the statutes of 1908, as above quoted.

From the foregoing it will be seen that the first important change in the section occurred in 1885, when the legislature made the changes mentioned, leaving the statute to read as fol-

lows: "When the recovery is effected in all cases, the value of the improvements made on the land so sold, and all taxes paid after the sale thereof, with interest thereon at the rate of fifteen per cent per annum, shall be ascertained by the jury," etc. We think the legislature, in amending the statute as shown, had but one object in view, which was to reduce the amount of interest recoverable upon taxes paid by the purchaser subsequent to sale, from twenty-five per cent to fifteen per cent.

In the Session Laws of 1870, § 82, page 114, provision was made for the redemption of lands sold for taxes, in which it was provided that upon all taxes accruing after the sale, and paid by the purchaser, he was entitled to recover thereon interest at the rate of twenty-five per cent.; and § 90, page 117, of the same act, provided that in case of redemption of lands sold for taxes, belonging to minors, idiots or insane persons, the purchaser was entitled to interest at the rate of twenty-five per cent per annum upon all taxes paid by him subsequent to the sale. But at no time, from 1870 to the present, do we find any law entitling a purchaser at a tax sale to interest upon the value of improvements placed upon the premises after sale, unless such right is conferred by the section quoted from the Revised Statutes of 1908, which is a substantial repetition of the act of 1885. When the legislature, in 1885, amended the act as above stated, it is apparent that they considered the amount of interest recoverable by a purchaser upon taxes paid subsequent to sale as too high and decided to reduce it from twenty-five to fifteen per cent; and instead of retaining the phrase in the amended act, "as provided by law," which required a resort to other provisions of the statute to ascertain the amount of interest recoverable, they adopted the speedier and more convenient plan of definitely stating in the repealing act itself the rate of such interest.

Having concluded that the only purpose of the legislature in making the change just referred to was to reduce the rate

of interest recoverable upon taxes paid, the conclusion logically and necessarily follows that the legislature did not intend to impose a charge for interest upon improvements which had not theretofore been charged. The judgment of the trial court should therefore be affirmed.

Judgment affirmed.

[No. 3943.]

ASMUSSEN, EXECUTRIX, ET AL. v. POST PRINTING & PUBLISHING COMPANY.

1. CONTRACT—*Construction.* A contract in ambiguous terms will be construed most strongly against the party by whom it is formulated. The facility with which a particular provision, not appearing in a writing, might have been inserted, if in the minds of the parties, may be considered. (420)

2. EVIDENCE—*Presumption.* Presumed that a contract presented by one party for the signature of the other, was formulated by the one so presenting it. (420)

3. GUARANTY—*Notice of Acceptance to Guarantor.* One who guarantees the payment of a debt to be created in the future, and of uncertain amount, is entitled to notice that his guaranty is accepted, and credit given on the faith thereof. Until notice given of the acceptance, the guarantor may withdraw. (419, 420)

It is not required that notice be given directly to the guarantor; information coming to the guarantor that the guaranty is being acted upon will suffice to bind him. (420)

4. CONTRACTS—*Construed—Guaranty.* An application, dated December 12, by Farrell for an appointment as agent of plaintiff, at a city named, followed by special engagaments on Farrell's part, and an acceptance by plaintiff's agent, dated December 14, and by an engagement, dated December 12, addressed to plaintiff and subscribed by defendants in these words: "In consideration of your acceptance of the foregoing application by * * *, the undersigned guarantees the fulfillment of each stipulation of the above contract and the prompt payment for all papers and supplies furnished thereunder, and in case such payment is not made, to pay you at your office in Denver, all the arrears upon demand."

Held, a mere proposal to become liable, upon condition only that Farrell's application should, within a reasonable time, be accepted by plaintiff; and that defendants became liable only upon notice thereafter, in some form, that their proposal had been accepted by plaintiff. *News-Times Company v. Doolittle,* 51 Colo. 386, distinguished. (419, 421)

5. PRECEDENTS—*Upon Questions of Commercial Law,* the court will search the opinions of the Supreme Court of the United States. (431)

Error to Denver District Court. HON. HUBERT L. SHATTUCK, Judge.

MR. H. A. HICKS, MR. CHARLES ROACH for plaintiffs in error.

MESSRS. ELLIOTT & BARDWELL, MR. JOHN T. BOTTOM and MR. MILNOR E. GLEAVES for defendant in error.

HURLBUT, J., rendered the opinion of the court.

This action was brought March 8, 1910, to recover a judgment against defendants (plaintiffs in error) in the sum of $1,141.19. The action was tried to a jury, which, under the instruction of the court, rendered a verdict in favor of plaintiff for $1,044.67, upon which judgment was entered.

The action is based upon a written contract entered into between plaintiff, defendants, and one Frank F. Farrell, at Cripple Creek.

The contract between plaintiff and Farrell, and the guaranty contract between plaintiff and defendants, appear on one instrument. It is headed with the following phrase: "Agents' Application, Agreement and Bond;" followed by the sentence, "I hereby apply for the agency of the Denver Post at Cripple Creek, Colorado;" then follows a number of special promises on behalf of Farrell, by which he agrees to do certain things; after which appears a paragraph binding plaintiff to pay Farrell the sum of $30 per month. It is then signed by Farrell, under whose signature appears the following: "Accepted by The Post Printing & Publishing Company this Dec. 14th, 1908, by P. B. McGlynn, Circulator thereof." Immediately following appears the guaranty contract, viz:

"Dec. 12th, 1908.

The Post Printing & Publishing Co.,

In consideration of your acceptance of the foregoing application of Frank F. Farrell the undersigned guarantee the fulfillment of each stipulation of the above contract and the prompt payment for all papers and supplies furnished there-

under, and in case such payment is not made, to pay you, at your office in Denver, all arrears upon demand.

E. H. ASMUSSEN,
TIM DREW."

The complaint, after setting out the contract, alleges that on December 12, 1908, defendants, in order to induce plaintiff to accept the application and agreement aforesaid of said Farrell, signed their names to said contract, and delivered the same to plaintiff; that by the terms thereof there became due from said Farrell to plaintiff the sum of $1,141.19; and that on February 16, 1910, plaintiff, in writing, demanded payment thereof from defendants and each of them. The complaint further alleges "that the aforesaid application and agreement was accepted by plaintiff herein in writing on, to-wit, the 14th day of December, 1908, and by virtue of acceptance went into force and effect as a contract between the said Frank Farrell and this plaintiff," etc.

The controlling question in this case, and which is decisive of this appeal, is: Did defendants, in signing the contract, thereby place themselves in the position of guarantors only, who were entitled to notice of acceptance of their guaranty from plaintiff before their liability attached; or were they original promisors, binding themselves in the first instance and at all events to pay any sum in default by their principal Farrell, whether plaintiff notified them of its acceptance of their guarantyship of not? Plaintiffs in error vigorously contend that they were simply guarantors, and entitled to notice of acceptance, while defendant in error insists that their undertaking was original, and bound them as sureties, without such notice. The question presented is of first impression in this state, and is of considerable importance to commercial branches of industry.

A brief statement of the record showing of facts may not be amiss. The evidence shows that the plaintiff was in Cripple Creek, by its authorized representative, Mr. Gunnison, on

December 12th, the day the contract was signed by Farrell and defendants, and was present at the time of such signing; further, that after they had signed the same it was delivered by them to Gunnison, who mailed it the same evening to the office of plaintiff in Denver; and that on December 14th plaintiff accepted it, in its entirety, by a formal written approval thereof. There is nothing in the guaranty contract which in terms requires a notice from plaintiff signifying its acceptance of defendants as sureties or guarantors.

It is our duty to construe the contract so as to give effect to the intention of the parties, if it can be ascertained therefrom, or, failing in this, from the circumstances surrounding the execution thereof. How did defendants probably view the matter on December 12th, at the time the contract was presented to them for signature? The whole instrument was before them. The first sentence in the contract read: "I hereby apply for the agency of the Denver Post at Cripple Creek, Colorado." At the end appeared the signature of Farrell, but there was no writing of acceptance or approval by plaintiff of the application. Immediately following Farrell's signature appeared the guaranty contract, beginning with the words, "In consideration of your acceptance of the foregoing application." Under this situation their natural reasoning would be that Farrell at the time had not been appointed by plaintiff as its agent, but would or would not be so appointed, in the near future, and if plaintiff did *not* thereafter accept the application they would not incur any liability in signing the contract, and with this impression they attached their signatures thereto. This then was their position at the time they signed the contract of guaranty. No contract existed between plaintiff and Farrell, or between defendants and plaintiff, and it was nothing more, on defendants' part, than an offer or proposal to become liable under the instrument they had signed, upon condition only that Farrell's application would, within a reasonable time thereafter, be accepted by plaintiff. Under such circumstances the law seems to be settled that

defendants were entitled to notice from plaintiff that their undertaking as guarantors had been accepted. It is not claimed that such notice was ever given. Either one of the signers, or Farrell himself, could have withdrawn from the written contract any time after they signed it, and before notice of acceptance. It was not binding on any of them until the latter date.

It is insisted by plaintiffs in error that the contract between defendant in error and Farrell, not being fully executed or completed until two days after Farrell had signed the same, there was nothing upon which their guaranty or suretyship could operate, and, not having received notice from plaintiff that it had accepted the written guaranty signed by them, they therefore were not liable thereunder.

The complaint itself states that plaintiff accepted the application and agreement December 14th, and by virtue thereof it became a binding contract on that day, so that it is conclusive this contract between plaintiff and Farrell first became effective on that date.

The record shows that the printed form of contract used in this case was furnished by plaintiffs. The presumption follows that plaintiff formulated the same. In such case the rule is general that if the contract is ambiguous the same will receive a construction most strongly against the one drawing the same and in favor of the other party, when such construction is reasonable and fair. The party drawing this guaranty contract could have inserted therein a short sentence, such as, "Notice of acceptance of guarantors' offer is hereby waived," or some similar expression, which would have bound the signers immediately upon the approval of the contract by plaintiff. There is nothing, however, of that character, in this contract. Under a contract containing an offer or proposal, which becomes binding upon the signers only after notice of acceptance of the same, it is not necessary that the notice be given directly by the guarantees, but any knowledge or information coming to the guarantors through other

sources, which apprises the latter that the former is acting upon the same, and furnishing goods or extending credit upon faith thereof, will be tantamount to direct notice. The record here, however, is silent upon this question. There is no showing that defendants ever knew that Farrell had been appointed agent, or that he was handling plaintiff's papers in pursuance of the contract mentioned.

It is clear from the record showing that the guaranty contract of defendants had to do only with events to take place in the future. By the very terms of the contract itself it appears that at the time defendants signed the same Farrell had not been appointed agent for plaintiff in pursuance of his application; therefore defendants guaranteed no existing debt, but undertook to guaranty the faithful performance, by their principal Farrell, of certain promises which he agreed to carry out in the future. This being true, we do not see how it can be said that the document signed by defendants was an absolute guaranty, unqualified by the usual requisite of notice, without which it would not be binding. Under the circumstances disclosed by this record we do not think the guaranty can be said to be absolute. It is rather an offer to indemnify. It refers to a debt which might or might not be created in the future. It may be observed that no limit was set upon the amount of liability that might be incurred against defendants in the future; nor was a limit of time fixed by the guaranty contract in which defendants' liability should cease. After the guaranty was executed, and at the time plaintiff accepted Farrell's application, no indebtedness existed in favor of plaintiff against Farrell for which defendants were liable; hence there was no debt upon which the guaranty could operate. From the facts shown it is apparent that defendants' contract was a collateral, continuing guaranty. No direct charge or entry was made by plaintiff, at any time, against defendants, its books showing that all the transactions with Farrell were carried on in his name. The authorities generally seem to adopt the rule that in case of a written guar-

anty for a debt to be created in the future, and uncertain in amount, the guarantor is entitled to notice that his guaranty has been accepted and credit given on the faith thereof. *Beebe v. Dudley,* 26 N. H. 249, 59 Am. Dec. 341; *Allen v. Pike,* 3 Cush. (Mass.) 238; *Norton v. Eastman,* 4 Greenl. (Me.) 521; *Howe v. Nickels,* 22 Me. 175; 2 Parsons on Contracts, 28; 20 Cyc. 1406 *et seq.;* Brandt on Suretyship and Guaranty, § 207; *Taussig v. Reid,* 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504. The last cited case sustains the rule, and contains a rather full discussion of the point, citing numerous authorities.

We have carefully examined all the authorities cited by plaintiffs in error and defendant in error, and discover that there is considerable conflict of authority in the several states concerning the necessity for notice of acceptance from the guarantee, in cases of this charater.

In *German Sav. Bank v. Roofing Co.,* 112 Ia. 184, 83 N. W. 960, 51 L. R. A. 758, 84 Am. St. 335, the guarantors undertook to pay the guarantee all notes, checks, etc., which might accrue from their principal, the Drake Roofing Co., within six months from the date of the guaranty, not exceeding the sum of $500. This guaranty was accepted by the guarantee, the German Savings Bank of Des Moines, but no notice of such acceptance was given to the guarantors (the case here). The court said:

"When defendants signed the letter of guaranty, the Drake Roofing Company was not indebted to the plaintiff. The advancements were made by the bank after the delivery of the instrument of guaranty, and the primary question is, was notice of the acceptance of the guaranty necessary? The authorities relating to this question are in hopeless conflict and, although some of the rules are fairly well settled, there is a want of harmony in the decisions applying them to special circumstances. When the guaranty is a letter of credit, or an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom

the application for credit is made, the decided weight of authority is that the guarantor must within a reasonable time be notified of the acceptance of the guaranty. But they differ more or less in determining what is a guaranty and what an offer to guaranty. Two very satisfactory and conclusive reasons are given for this general rule. The first is that the so-called guaranty is a mere offer or proposition, and is not complete until the party making the offer is notified of its acceptance, when the minds of the parties meet, and the contract is completed. The second is that the party making the offer is entitled to know whether or not his offer has been accepted, that he may know his responsibility, and so regulate his course of conduct toward the principal debtor that he may not suffer loss. * * * There is no evidence of any request from plaintiff to defendant guarantors, or of any consideration moving from it, and received or acknowledged by them at the time they signed the guaranty, or that credit was extended the Drake Roofing Company at the time the letter of guaranty was delivered. (These remarks apply to the case at bar). * * * We are of opinion that the instrument was in legal effect a mere offer of guaranty, requiring notice of acceptance to bind the guarantors."

The case is most thoroughly considered, and discusses at length, with numerous citations of authorities, the question under consideration.

In *Detroit Free Press v. Pattengill*, 155 Mich. 272, 118 N. W. 927, the court had under consideration the following contract:

"To The Detroit Free Press Co.,

Detroit, Mich.

You are hereby authorized to furnish W. M. Kimmel, of Lansing, Mich., with copies of the Detroit Free Press for sale, the undersigned hereby agreeing to become responsible to you for the prompt payment of all bills for such papers to the amount of $500.

The undersigned also agreeing to become responsible for any loss to The Free Press Co., not exceeding $300.00 in the event of the non-performance of section six of the above agreement.

HENRY R. PATTENGILL,
Surety, of Lansing, Mich."

The court said:

"We think the true construction of the undertaking is that it is a collateral guaranty. The situation of the parties indicates that it was the desire of the Free Press to have security from Kimmel for the payment of such papers as it should sell him (Kimmel). It was Pattengill's object to furnish such security. The undertaking therefore must be construed as a guaranty, and, under the rule laid down in *De Cremer v. Anderson,* 113 Mich. 578, 71 N. W. 1090, can only become binding upon the guarantor after notice of acceptance."

De Cremer v. Anderson, supra, involved a contract of goods purchased, the guarantor guaranteeing to pay any amount due from the purchaser, not exceeding $300. The court said:

"In the case at bar the guaranty was not signed by the guarantors at the request of the plaintiff. No consideration passed from the plaintiff to the guarantors, or was acknowledged in the guaranty. It was not accepted by the plaintiff at the time it was given, and he did not agree to accept it until he had satisfied himself of the responsibility of the guarantors, which he proceeded to do some days afterward by correspondence with the register of deeds. Under such circumstances the guarantors were entitled to know that their guaranty had been accepted before they were bound."

The same situation obtains in the case at bar as is stated in the foregoing quotation. See also *Allen v. Pike, supra; Acme Mfg. Co. v. Reed,* 197 Pa. St. 359, 47 Atl. 205, 80 Am. St. 832; *Deering Harvester Co. v. Sulser,* 78 Mo. App.

670. In the last cited case the written guaranty reads in part as follows:

"In consideration of the appointment or retention of the above party as agent of Deering Harvester Co., for the sale of its harvesters, binders, reapers, mowers, trucks, extras, twine and other property in certain territory, the undersigned jointly and severally guarantee the fulfillment by said agent of all his obligations and duties growing out of and relating to such agency or otherwise that now or hereafter may exist," etc.

The court said:

"There was no contract, much less a guaranty of that contract, at the time defendant signed the paper now sought to be made a guaranty. The paper on which the contract was written especially withheld from it any force as a contract, or any acceptance of defendant as guarantor, until such acceptance had been indorsed by plaintiff at Chicago, Illinois. * * * There is therefore no room to question that the whole matter stood as a proposal until it was accepted. If plaintiff had exercised its right and disapproved either the contract or the guaranty, surely there would be no pretense that defendant was liable. Plaintiff chose the other alternative and approved both, but it failed to notify defendant, and hence he is not liable, and the circuit court properly so instructed. *Davis Sewing Machine Co. v. Richards,* 115 U. S. 524, 29 L. Ed. 480, 6 Sup. Ct. 173, a case much in point."

See also: *Rapelye & Purdy v. Bailey,* 3 Conn. 438, 8 Am. Dec. 199; *Craft et al. v. Isham,* 13 Conn. 28; *Smith & Co. v. Thesman,* 20 Okla. 133, 93 Pac. 977, 15 Ann. Cas. 1161, citing with approval *Davis S. M. Co. v. Richards, supra; Barnes Cycle Co. v. Schofield,* 111 Ga. 880, 36 S. E. 50; *Kuhlman v. Cave,* 135 Wis. 279, 115 N. W. 793; *Bishop v. Eaton,* 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; *Winnebago Paper Mills v. Travis,* 56 Minn. 480, 58 N. W. 36; *Babcock v. Bryant,* 12 Pick. (Mass.) 133.

The recent case of *American A. C. Co. v. Ellsworth,* 109 Me. 195, 83 Atl. 546, involved the construction of a written guaranty, which read in part as follows:

"In consideration of the sum of one dollar to me in hand paid by the American Agricultural Chemical Company * * * I do hereby guarantee the faithful performance by George E. Berry of all and singular the obligations of the within agreement on his part to be kept and performed and all renewals and extensions thereof, so long as said agency shall be continued."

The court said:

"This is a continuing guaranty; and the general rule is well settled in this state, as well as elsewhere, that in case of such a guaranty for debts yet to be created, and uncertain in their amounts, the guarantor is not liable, unless the guaranty is accepted, and notice of the acceptance is given to the guarantor within a reasonable time. * * *

"Since a contract of continuing guaranty is not complete without acceptance, or the existence of conditions which render acceptance unnecessary, the burden is on the plaintiff, suing upon such a guaranty, to show that it was accepted, or that it comes within the exceptions to the rule; that is, the plaintiff must show a completed and binding contract. Merely showing a signed guaranty is not enough."

See also: *Lester Piano Company v. Romney,* 126 Pac. (Utah). In *William Deering Co. v. Mortell,* 21 S. D. 159, 110 N. W. 86, 16 L. R. A. (N. S.) 352, the court, having under consideration the construction of a guaranty contract, said:

"The true test, we think, in determining whether a guaranty is in fact an offer of guaranty, or an absolute guaranty, is whether there is mutual assent."

The case is reported in 16 L. R. A. (N. S.) 352, with copious annotations which practically exhaust all phases of the question under consideration.

Numerous other cases could be cited from the various states following the rule adopted in the cases cited.

The two strongest cases which support the position of defendant in error are *Watkins Medical Co. v. Brand et al.*, 143 Ky. 468, 136 S. W. 867, and *Wilcox v. Draper*, 12 Neb. 138, 10 N. W. 579, 41 Am. Rep. 763. We notice that in the former case the court cited in support of its conclusions *White Sewing Machine Co. v. Powell*, 25 Ky. Law Rep. 94, 74 S. W. 746, the facts of which case are different from the *Watkins Medical Co. v. Brand* case, and the one at bar, in this, to-wit: The controversy related to a *bond* executed jointly by the debtor and his sureties. It is in line with the decision of our Supreme Court in *News-Times Pub. Co. v. Doolittle*, 51 Colo. 386, 118 Pac. 974, to which we will hereinafter refer. In the case of *Watkins Medical Co. v. McCall*, 116 Minn. 389, 133 N. W. 966, the court had under consideration a contract identical with that in *Watkins Medical Co. v. Brand et al.*, and arrived at an opposite conclusion to that reached in the Kentucky case. In the Minnesota case the court followed its former ruling in *Winnebago Paper Mills v. Travis, supra.*

We have carefully examined all of the numerous cases cited by defendant in error, and find, with the exception of the Kentucky and Nebraska cases just mentioned, they are each readily distinguishable from the case at bar in one or more of the following respects: (1) The written guaranty in each instance was signed at the very time the contract between the guarantee and the original or principal debtor was executed; (2) the contract to which the guaranty related had been fully executed at some time prior to such signing; (3) request by the guarantee had been made of the guarantor to execute the guaranty; (4) acceptance of the guaranty was made by the guarantee at the time it was signed; (5) the guaranty contract and principal agreement were simultaneously executed, and appeared together upon the same instrument, fully executed; (6) a consideration passed from the

guarantee to the guarantor for his undertaking; (7) the guaranty consisted of a writing in the nature of a bond, which was signed jointly and severally by the principal and sureties. In each of the distinguishing features just enumerated the generally accepted rule of law renders unnecessary a notice of acceptance by the guarantee. By way of repetition we again say that in the case at bar it is conclusively established that, at the time defendants signed the guaranty, no contract was in existence between plaintiff and defendants or between plaintiff and the debtor Farrell. If any liability could possibly arise against defendants, under their guaranty, it was one which necessarily must arise in the future, and relate to a debt yet to be created and uncertain in amount, as well as to time. This certainly shows a continuing, collateral guaranty, which, under the authorities cited, necessitates a notice of acceptance from the guarantee, under facts similar to those disclosed by the record.

The case of *News-Times Pub. Co. v. Doolittle, supra,* relied upon and discussed at length by defendant in error, is not in point, as the instrument there construed was signed jointly by Doolittle, as agent, and Simon and Barclay as sureties. The Supreme Court held they were jointly and severally liable, and that Simon and Barclay were sureties, and not guarantors, and were bound with their principal in one and the same instrument, executed at the same time, and for the same consideration.

The general trend of the authorities, as above shown, appears to be against the Kentucky and Nebraska cases cited. But, admitting as we do the conflict in authorities in the several states upon the question under consideration, we feel in duty bound to obtain light, if possible, upon the disputed issue, from the rulings of the supreme judicial tribunal of our country, the Supreme Court of the United States. The question involved is one of commercial importance, and that court has directly passed on the law governing the situation we have before us, in the case of *Davis Sewing Machine Co. v.*

Richards, supra. That case involved the construction of a contract of guaranty which reads as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand ($3,000) dollars. Dated Washington, D. C., this 17th day of December, 1872.

A. ROTHWELL,
A. C. RICHARDS."

Under the guaranty were these words:

"I consider the above sureties entirely responsible. Washington, December 19, 1872.

J. T. STEVENS."

The contract mentioned was executed by Poler, and the guaranty signed by the sureties, after which both were delivered to Stevens, the machine company's attorney, and by him to the company, with his recommendation noted. The company afterwards delivered goods to Poler under the contract, which were not paid for. The sureties had no notice of the company's acceptance of the guaranty, and no notice or knowledge that the company had furnished any goods to Poler, under the contract, or upon faith of the guaranty, until several years after the transactions mentioned. At the time the guaranty was signed the company was furnishing no goods to Poler. The negotiations then pending between Poler and the company related to prospective transactions between them. Justice Gray delivered the opinion of the court, from which we quote as follows:

"The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of

Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686, in which the earlier decisions of this court upon the subject are reviewed.

"Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

"The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, 'value received,' were without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterwards, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor."

From our research we have been unable to discover that the case mentioned has ever been modified, criticised or reversed, to the present time; but, on the contrary, it has been repeatedly referred to and followed by the subordinate federal courts of the country, and has frequently been cited, followed and approved, by the courts of last resort in a number of states. The question being one of great importance, of first impression in this state, and the states being in conflict as to the better rule to follow, under such circumstances, we find that both our appellate courts have in the past accepted and followed the decision of the federal tribunal.

In *Ristine v. Blocker,* 15 Colo. App. 224, 61 Pac. 486, the court, speaking through Judge Bissell, said.

"Speaking for myself principally, but being entirely authorized thereunto by the entire court, I desire to emphasize the position which I have often taken, that wherever there is a debatable question and there are two lines of authority, and one is supported by the Supreme Court of the United States and the other condemned by it, we accept the decision of that tribunal."

From *D. & R. G. R. R. Co. v. Whan,* 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432, 12 Ann. Cas. 732, we quote as follows:

"Whatever might be the result of a numerical comparison of the cases, deciding the questions involved in this case, *pro* and *con,* we think we should be controlled by the decision of the Supreme Court of the United States on these questions, if there be no provision of the law of our own state which renders it inapplicable."

In *Metropolitan Casualty Ins. Co. v. Bergheim,* 21 Colo. App. 527, 122 Pac. 812, the court said:

"Due regard for the principle of uniformity of decision in respect of matters pertaining to general commercial law, impels us to accept the general conclusion thus sustained by the evident current of authority."

Defendant in error has referred to a line of cases holding that where a contract of guaranty is executed contemporaneously with the principal contract, to which the guaranty refers, both contracts appearing upon the same instrument, no notice of acceptance of the guaranty undertaking is required from the guarantee to the guarantor; such decisions being principally based upon the reasoning that, if the entire transaction is simultaneous as to all the parties concerned therein, and the contract between the guarantee and debtor is executed, and before the guarantor for inspection at the time of his signature, under such circumstances no notice is required. The principal case cited by defendant in error to sustain the proposition stated is *Bechtold v. Lyon,* 130 Ind. 194, 29 N. E. 912. But in that case, as well as others cited, involving facts similar to those existing in the record before us, we discover that the contract between the guarantee and debtor was fully executed at the time of, or had been in existence for some time prior to, the signing of the guaranty undertaking by the guarantors. The distinction is important, in view of the court's reasoning in those cases. If, at the time the guarantor signed the undertaking, the principal contract had been fully executed for some time prior thereto, or was then executed and completed, the guarantor would be fully informed of the binding character of his principal's promises and agreements; while if such contract was only tentative he would have no means of knowing whether the same would or would not be, in the future, executed and completed as written. Therefore we do not consider the cases cited as being in point.

From what has heretofore been said, and the authorities cited, we have reached the conclusion that, under this record, plaintiffs in error were entitled to notice of acceptance from defendant in error of their guarantyship; and the court erred in directing the jury to return a verdict for plaintiff. The case should have been submitted to the jury for their deter-

mination under proper instructions. The judgment is reversed and the case remanded for new trial.

Reversed and Remanded.

[No. 4068.]

SCHOOL DISTRICT NO. 46 SEDGWICK COUNTY v. JOHNSON.

1. SCHOOLS—*Teacher—Employment of Disqualified Person.* Under Rev. Stat., sec. 5990, the contract of a school district to employ as a teacher a person having no license to teach, is absolutely void. It binds neither party and requires no revocation. (434, 435)

The mere fact that the person employed secured a license before the term appointed for her labors to begin, makes no change in the rule.

Otherwise, if, being so qualified, she is permitted by the school board to proceed with the performance of her contract. *Hotz v. School District,* 1 Colo. Ap. 40, and *School District v. Ross,* 4th Colo. Ap. 493, distinguished. (436)

That the school board neglected to notify the teacher that her employment had been revoked, until the day before the term of her employment was to begin, *held* immaterial. (438)

2. —— *Money Paid for Services Rendered by Disqualified Person.* Where one who has a proper certificate at the commencement of her service, which expires before the expiration of the term of her employment, is permitted by the board to continue until the end of the term, and is paid for such service, the payment cannot be recovered—the parties are in *pari delicto.* (437, 438)

3. STATUTE OF FRAUDS—*Contract Not to Be Performed Within One Year.* Verbal contract made in April for the employment of a teacher, her services to begin in the next September, and continue till the May following, is void. The year commences with the making of the contract. (437)

Error to Sedgwick District Court. HON. H. P. BURKE, Judge.

MESSRS. ROLFSON & HENDRICKS for plaintiff in error.

MESSRS. MUNSON & MUNSON for defendant in error.

KING, J., delivered the opinion of the court.

Bertha M. Johnson, defendant in error, brought her suit against School District No. 46, of Sedgwick county, Colorado, to recover the sum of $540 which she alleged to be due her for breach of a contract of employment. In April, 1912, the de-

fendant district made an order appointing the plaintiff to teach the district school in that district for the term beginning September, 1912, and continuing until and including May, 1913, at a salary of $65 per month. Notice of this order was given to plaintiff, and she accepted the appointment. Both the notice and the acceptance were verbal.

At the time of this appointment and acceptance, plaintiff possessed no license or certificate to teach. In June the school board of said district revoked its order, but did not give her notice of such revocation until the day before the fall term of the school was to begin. At that time she received a letter from the school board, advising her that the order had been vacated, and that another person had been employed to fill the place. Plaintiff presented herself, at the beginning of the school term, offered to perform the services for which she claimed to have been employed, was ready at all times thereafter to perform the required services, was unable to procure another school, or least did not, and brought suit for the salary for the entire nine months constituting the school year. Judgment went for the plaintiff for seven months' salary, the balance of the demand being denied because it was not shown that she might not have obtained a school for the rest of the year.

1. Section 6754 M. A. S. 1912, 5990 R. S. 1908, provides that "no district board shall employ any person to teach in any of the public schools of the state unless such person shall have a license, issued by the proper district, county or state authority, and in full force at the date of employment," and further provides that "any teacher who shall commence teaching in any such school without such license shall forfeit all claim to compensation out of the school fund for the term so teaching without such license."

The prohibition contained in said statute, forbidding the employment by any district board of any person not having, at the time of entering into the contract, a proper license to teach in the public schools of the state, operates directly upon

any such contract attempted to be made, and renders it wholly void and unenforceable by either of the parties to the contract. The statutory provision quoted is a plain and unequivocal expression of the public policy of the state with reference to the employment of teachers in the public schools. The alleged contract being void *ab initio,* no revocation thereof was required, and a cause of action supported only by proof of such contract could not be sustained, and, as it does not appear that such illegal contract was in any manner lawfully ratified by the defendant after plaintiff became qualified by receiving her certificate, the judgment cannot be sustained.

In this conclusion we are upheld by many authorities, and by what we regard as a sound public policy governing the employment of teachers.—*Catlin v. Christie,* 15 Colo. App. 291, 63 Pac. 328; *Hotz v. School District,* 1 Colo. App. 40, 27 Pac. 15; *Putnam v. School,* 69 Ind. 80; *O'Connor v. Francis,* 42 App. Div. 375, 59 N. Y. Supp. 28; *McCloskey v. District,* 134 Mich. 235, 96 N. W. 18; *Wells v. People,* 71 Ill. 532.

In *Catlin v. Christie, supra,* it is squarely held that such a contract is null and void. We quote the following from the opinion in that case:

"It has been repeatedly held that contracts made in violation of this statutory provision, which exists generally in states having a public school system, are wholly void. Any attempted act of the school board in contravention of this section is absolutely null and of no effect. * * * This provision of the statute is a wise one, and should be upheld. School directors should not be permitted to violate it, either directly or by evasion."

And in *Putnam v. School,* under a similar statute, it was said:

"It is contended that the employment referred to has relation to the time when the school begins, and not to the date of the contract of employment, and that, hence, if the teacher has a license to teach at the time the school is to begin, that is

sufficient, notwithstanding the contract of employment may have been entered into previous to the issuing of the license. In our opinion this latter construction cannot be maintained. * * * As we construe this section, a contract for the employment of an unlicensed teacher in a common school is void by reason of the statutory inhibition against it, and is not ratified by the subsequent issuance of a license to the teacher."

The defendant in error contends that the foregoing statutory provision has been so construed by the courts of this state that the action can be sustained, in view of the fact that plaintiff procured her proper evidence of qualification before the term of employment was to begin, in support of which she cites *Hotz v. School District,* 1 Colo. App. 40, and *School Dist. No. 1, San Juan Co. v. Ross,* 4 Colo. App. 493. Neither of these cases supports such contention. In no case in this state has it been held that an action can be sustained by the teacher where the services have not been actually performed. In *Hotz v. School District,* although the first contract of employment made between the teacher and the school district was void because she was not qualified when the same was made, nevertheless she thereafter entered upon the performance of her duties under a new arrangement made by the school board, by which a temporary certificate was procured by her before she commenced her services, and thereafter she obtained a proper certificate, under which circumstances it was held that "the commencement of the school by the teacher with the knowledge and consent of the board, after she had received a certificate of qualification, was equivalent to the making of a new contract upon the terms of the one into which they attempted to enter at their meeting held in August." Citing *Scott v. School Dist.,* 46 Vt. 452.

In *School Dist. v. Ross* it appears that at the time the contract between the school district and the teacher was entered into, a temporary certificate was in full force, and that a few days after school commenced, a first-grade certificate, issued in another county, was endorsed and made effective,

under which Ross continued to teach until discharged. The circumstances are not such as to make it, or anything decided therein, applicable in support of the contention of defendant in error in this case.

2. Plaintiff in error also relies upon that portion of the statute of frauds which declares void "every agreement that by the terms is not to be performed within one year from the making thereof." The alleged contract was made in April, 1912, and the term of employment agreed upon was to extend until and including May, 1913. The contract sued upon, if otherwise valid, was void under the statute of frauds. The year mentioned in the statute runs from the day when the agreement is made, and not from the day when the performance is to begin.—20 Cyc. 198; *Biest. v. Versteeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081. The contract herein sued on was denied by the answer. The statute of frauds was available without being specially pleaded.—*Salomon v. McRae*, 9 Colo. App. 23, 47 Pac. 409.

3. The defendant filed a cross-complaint, seeking to recover from the plaintiff salary actually paid to her for services performed under an employment extending from September, 1911, to May, 1912, on the allegation that at the time the services were performed plaintiff was not qualified to teach. A demurrer to this cross-complaint was sustained. The evidence at the trial showed that at the time plaintiff was employed for that year, she had a certificate authorizing her to teach, but which expired soon after she began the term of school. The plaintiff having been qualified at the time the contract of employment was entered into, and the board having accepted her services without objection and paid for the same, there are few, if any, authorities, and no good reasons, which would permit the district to recover for money already paid, notwithstanding the terms of the statute, which provide that if the term of school for which the teacher is employed extends more than one month after the expiration of such certificate, the teacher shall secure a new certificate, or a renewal

of the one held, while it is in force. So far as that contract of employment was concerned, whether considered under the demurrer or the evidence, the parties were *in pari delicto.* Money paid under an agreement which is executed, whether paid as the consideration or in performance of the promise, cannot be recovered back, where the parties are *in pari delicto.* —9 Cyc. 549; *Branham v. Stallings,* 21 Colo. 211, 40 Pac. 396, 52 Am. St. 213.

The unexplained failure of the school board to notify plaintiff at an earlier date of the revocation of her appointment subjects the members of the board to censure, but for such failure the school district cannot be held legally responsible in damages under the void contract. The teacher is required to have special training as to the school law, upon which she must pass an examination, and it must be assumed that, knowing the law, she, as well as the school board, violated it, and, being *in pari delicto,* neither law nor equity affords her redress.

For the reasons given, the judgment is reversed as to that part which permitted a recovery by the plaintiff, and is affirmed as to that portion which denied to the school district a recovery under the cross-complaint.

Reversed in Part, Affirmed in Part.

[No. 4069.]

THE PEOPLE, EX REL. WEISBROD V. LOCKHARD ET AL.

1. QUO WARRANTO—*Leave of the Court Unnecessary,* when the district attorney has given his consent, (440)

2. —— *Public Interest.* The proceeding has no place when the injury complained of is entirely private, and the interest of the public in no way involved. (440)

But that the relator seeks the redress of a private wrong, and that this is the main purpose, upon his part, in the institution of the proceeding, has not the effect to reject from consideration the interest of the public, apparent in the record. Allegations that the defendants unlawfully assume to be and act as the directors of an irrigation district, never lawfully organized, that they have incurred large expenses, and are proposing to issue in the name of such supposed district, bonds to the amount of $200,000, and will sell them at a rate less than that prescribed by statute, sufficiently discloses the interest of the public. (440, 441)

Each case must be determined upon the particular facts thereof. (441, 445)

The mere fact that all other citizens of the district are opposed to what the relator desires does not conclusively negative the public interest. *People v. Colorado, etc., Co.,* 8 Colo. Ap. 301; *State Railroad Commission v. Denver, etc., Co.,* 44 Colo. 345; *State v. Atcheson Co.,* 176 Mo., distinguished. (444)

3. —— *Relator, Who May Be.* The owner of land within the limits of an alleged irrigation district, subject to taxation for the expenses of the district, and for the payment of bonds which it may issue, may be the relator in *quo warranto* to question the legality of the district organization. (452)

4. —— *Parties—Defendants. Quo warranto* assailing the organization of a corporation, the supposed corporation is not a necessary party. (453)

Error to Garfield District Court. HON. JOHN T. SHUMATE, Judge.

MESSRS. C. W. DARROW, JOHN H. VOORHEES for plaintiffs in error.

MESSRS. L. E. KENWORTHY, J. W. DOLLISON for defendants in error.

MORGAN, J.

Proceeding in the Garfield District Court in the nature of *quo warranto* under chapter 28, section 320, to 329, Code Civ. Proc. Rev. St. 1908. A general demurrer to the relator's complaint was sustained; he stood on his demurrer and judgment followed for the defendants.

The lower court decided that the action sought "to redress an alleged private injury, only, to the relator," and this is the principal question involved, along with the contention that he should have obtained leave of court to bring the action, and also that the act of May 3, 1905, concerning irrigation districts, secs. 3440 *et seq.* Rev. St. 1908, is unconstitutional. It is not necessary to consider the constitutionality of the act.

As to the right to commence the action without leave of court, when the district attorney refuses to act, and, *a fortiori,* when he gives his consent for the relator to act, as in this case, it is unnecessary to obtain leave of court. *People v. Regents,* 24 Colo. 175, 49 Pac. 286; *Canon City Club v. The People,* 21 Colo. App. 37, 121 Pac. 120.

As to the principal question, it is concluded that the relator's information or complaint was sufficient, although profuse in relating the private injury, and parsimonious as to the public. It has been directly held that an action of this kind cannot be brought to redress a private injury only, where the public is in no way involved. *People ex rel. U. P. R. R. Co. v. Colo. Eastern R. R. Co.,* 8 Colo. App. 301, 307, 46 Pac. 219; *State Railroad Com. v. The People ex rel., etc.,* 44 Colo. 345, 98 Pac. 7, 22 L. R. S. (N. S.) 810. Nevertheless, the facts alleged here disclose that a public question of considerable moment is involved, necessarily, and by the complaint, (voluminously), including the private rights of the relator. The complaint states that the three defendants, first named, are acting as directors of Divide Creek Irrigation District, and that no such district has been lawfully organized for reasons set forth in the complaint, all of which being admitted to be true, for the purpose of the demurrer, show that such district has not been lawfully organized as provided by the statute. The complaint also states that the other defendant is acting as secretary of said district, and that the defendants have incurred great expenses, and issued warrants to the amount of $11,585.98, and are about to issue and sell

bonds in the sum of $200,000, and that the same will be sold for much less than the act requires them to be sold for, and otherwise to exercise the franchise claimed by the defendants under and by virtue of said unlawful organization of the district.

It is not difficult to determine that the private injury which the relator complains of is his principal grievance, however this does not exclude the things of which the public may complain, and which are disclosed by the complaint. The line of demarkation is not plain and must be drawn in accordance with the facts in each particular case. The two cases above given holding that this kind of action cannot be brought to redress a private injury only, may seem to determine this question against the relator, but in one or two particulars, those cases are not the same as the present case. The mere fact that the relator expects a private wrong to be redressed as a result, does not exclude the interest the public has in the lawful organization of the district, and the exercise of the franchise, to be obtained thereby. It seems the public would be as clearly interested in seeing that an irrigation district, or individuals asserting the right to represent it, shall not usurp the powers given such districts, when lawfully organized, when it appears such district has not been so organized, as it has in seeing that an individual shall not usurp the power and authority given him, if lawfully elected to an office, when it appears he has not been so elected; and it is too well known to cite authority in the support thereof that *quo warranto* is the acknowledged remedy in the latter instance.

The act of May 3, 1905, as amended, now appears in the Rev. St. 1908, as follows, sec. 3440:

"Whenever a majority of the resident freeholders owning lands in any district desire to provide for the irrigation of the same they may propose the organiaztion of an irrigation district under the provisions of this act, and *when so organized* each district shall have the powers conferred or that may

hereafter be conferred by law upon such irrigation district" (italics ours).

The act then outlines the way in which such an organization may be formed, the method of its management, and defines the powers thereof; thereby conferring upon such district rights and powers similar in many respects to a municipal corporation less than a county, town or city, conferring upon it also certain public and *quasi*-public privileges greater than the rights and powers conferred by charter to an ordinary private or *quasi*-public corporation organized for private concerns. Such districts are given authority to own property such as water rights, ditches, reservoirs, etc., for irrigation purposes; to incur obligations, sue and be sued; to issue bonds for the purpose of constructing or purchasing such property, and providing that the real property in the district capable of irrigation may be assessed, and that the county commissioners shall levy a special tax thereupon, for the payment of the bonds and other expenses of the district. These rights and powers are great, and the exercise of such a franchise by such districts should not be permitted unless the law has been complied with in the formation and organization thereof. The opening section of the act provides that "when so organized each district shall have the powers," etc. It is not probable that any wholly disinterested person, or a person whose private rights have not or will not be disturbed, would take any action, or that the district attorney would do so, unless called upon by someone whose private rights would be affected by the exercise of the powers given to such district. Our courts have held that a relator in *quo warranto* proceedings *must have some* interest in the matter before he would be entitled to institute such proceedings. *People v. Grand River Bridge Co.*, 13 Colo. 11, 21 Pac. 898, 16 Am. St. 182.

The relator being the owner of land within the proposed district, capable of irrigation and subject to a levy of a tax for the payment of expenses and the bonds about to be sold, and being opposed to having his land so subjected, or un-

lawfully subjected, and desiring to attack the validity and regularity of the organization and formation of the district, as well as to enjoin the defendant from acting as directors and thus incurring the expenses and selling the bonds, ought to have some means in his own behalf of testing in court the validity and regularity of such organiaztion and the consequent exercise of the franchise by the defendants. If he had begun an ordinary suit in equity he could not in that kind of an action attack the validity of the corporation, *Wason v. Major,* 10 Colo. App. 181, 50 Pac. 741. It seems therefore that he should be permitted to avail himself of the remedy provided in the *quo warranto* statute, and suggested in the act authorizing the formation of the district in section 3453 thereof, to the effect that if the "legality or regularity of the formation or organization shall not have been questioned in a *quo warranto* proceeding instituted in the district court * * * within one year, * * * shall be conclusively deemed to be a legally and regularly organized district within the meaning of this act." Under this provision the query arises—could any other proceeding be instituted to test the validity and regularity? And if answered in the negative, would not this provision supplement the *quo warranto* statute, and supersede any ruling by the courts as to the right to bring the proceeding to redress a private injury only, and authorize a suit, in such instances, even if the main purpose were to redress a private injury? However, it seems unnecessary to apply such a strict construction, because it is more reasonable to adopt the simpler conclusion that an inquiry into the validity and regularity of such an organization would necessarily involve more than the purpose of redressing a private injury. In this case, even if the relator's main purpose, in bringing the suit, was to redress his own private injury, it appears from the allegations in his petition that the public would be interested in requiring the law to be complied with in organizing a district of this character, although it may not be directly and positively so alleged. The powers

given to such a district are such that in the exercise of its franchise it will deal with the public quite generally, not only in incurring expenses of management and the purchase of property, but in the floating of a bonded indebtedness offered to the public; the interest of the public would be subserved by having the organization judicially declared to be valid and regular, whereby no franchise would be usurped which the public has, by statute, conferred upon such district. Or, if the organization be declared to be invalid, it may be cured or corrected by supplying or correcting the defects thereof. These irrigation districts have been judicially declared to be public corporations, *McCord Merc. Co. v. McIntyre,* 25 Colo. App. 276, 138 Pac. 59, 60; *Anderson v. Grand Valley Ir. Dist.,* 35 Colo. 525, 534, 85 Pac. 313, and whether public, *quasi*-public, or municipal, the public is interested in the lawful organization thereof. The assertion of the right, and the exercise thereof, by individuals acting as directors of irrigation districts, to use the public franchise so granted, when the district has not been lawfully and regularly organized, is in the nature of a violation of a public law, and any interested citizen ought to have the same right to a *quo warranto* proceeding to inquire into the authority of such individuals to act as if they had usurped, or intruded into. a public office.

The right of a relator to institute *quo warranto* proceedings seems to be hedged in on both sides by the decisions—he must have some interest, such as a taxpayer or property owner, in the municipality or district, more than an ordinary citizen, and, on the other side, his interest should not be such that the only purpose and result of the proceeedings is to redress a private injury.

The mere fact that all other citizens in the district are in favor of its continuation and of the current management and sale of the bonds, etc., does not necessarily and conclusively show that the public is not interested, or that even they

would not be benefited by a judicial sanction, as to the validity of the organization, or *vice versa*.

Counsel for the defendants rely upon but three cases to support their contention that the action was brought for the sole purpose of redressing a private injury, to-wit: *People ex. rel. U. P. Ry. Co. v. Colo. Eastern Ry. Co.*, 8 Colo. App. 301, 46 Pac. 219; *State Railroad Com. v. D. & R. G. R. R. Co. et al.*, 44 Colo. 345, 98 Pac. 7, 22 L. R. A. (N. S.) 810; *State ex. inf. Crow v. A. T. & S. F. Ry. Co.*, 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761.

From an examination of these cases, and some others of like nature, it may be concluded, so far as the exact question involved in the present case is concerned, that each case must be determined upon the particular facts thereof, and that no hard and fast rule can be adopted that will fit every case.

In the first of the above cases, the fourth syllabus is as follows: "It is held under the facts and circumstances of this case," etc. In the second case, the courts said: "Our conclusion is that this is not a proper case for the prosecution of a proceeding in the nature of *quo warranto*." In the third case the court said we do not "think the information shows such a state of facts as would from any standpoint of view authorize the issuance of the writ of ouster."

Thus it appears that the facts of each particular case must determine the question as to whether the action is brought to redress a private injury or protect a private right, as contradistinguished from a public right.

Having determined that every case must rest upon the facts involved, for a determination of this question, the facts and circumstances of the three cases aforesaid will now be examined and compared with the facts in the present case.

In the first case, aforesaid, one railroad company endeavored to oust, by *quo warranto*, another from the exercise of its corporate powers, simply because it was seeking to condemn lands belonging to the relator; and attacking the corporate existence of the respondent on the ground that it had

not complied with a statute requiring that "within two years from the record of its articles it should begin the construction of its road, and expend thereon twenty per cent of its capital stock within five years," or forfeit its corporate organization. Not thereby attacking the validity of its organization, but the validity of its acts thereafter, and seeking to do by *quo warranto* what could and ought to be done by a suit in equity, or in the very condemnation suit which was then pending. The court in that case said that the thing complained of is the condemnation of lands, and "There is no other one act or thing charged which can be said to constitute an absolute wrong which calls for redress." Therefore, no harm whatever could come to the people by reason of any charge made by the relator in that case. The court further said in referring to the purpose of the proceeding in that case: "It is without a solitary public feature, and must be taken to be purely a private suit, brought by private parties to accomplish their private ends." No public corporation, municipal in character, was involved. Both the relator, railroad, and the respondent railroad, were private, or possibly *quasi-public,* corporations, both lawfully organized, and no usurpation charged that directly affected the public.

Now, comparing that case with the present case: It is charged by the relator in the present case that the three defendants, Lockard, Fain and Hover are, falsely and fraudulently and without right, power or authority so to do, claiming to be, and are acting as, directors of said district, the other defendant as secretary, and have falsely and fraudulently usurped the powers, authority and franchises of directors, and have so intruded themselves into office as directors, when such district had not been legally and regularly organized (for reasons given), and that they have not been legally elected or chosen for such offices. In the present case the defendants are charged with usurping the franchise, and the powers under it, of a public corporation permitted to be organized for a public purpose, that of reclaiming arid lands,

and given taxing powers, the same as school district, whereby the lands, capable of irrigation in the district, may be publicly taxed and the taxes levied and collected by the county authorities, the same as towns and cities and school districts. The defendants could act as they are charged, if there were no usurpation or intrusion, but, if they have wholly failed to comply with the law in forming and organizing the district, then there is a usurpation and an intrusion, and the private rights of the relator is not the thing usurped, or intruded into, but the rights of the public, in seeing and knowing that the law has been complied with, and that the alleged acts of defendants will not be unlawful, that the warrants and bonds they issue will not be invalid, and that the lands within the district will not be unlawfully taxed, and for a purpose not intended by the act. It seems to be successfully charged that the lands located in the proposed district, and the irrigation thereof, so proposed, do not come within the provisions of the act, and that, if the law is strictly followed, no district can be formed in such locality, or organized, for the purposes for which the act was designed, and that the facts and conditions there existing do not warrant or call for such a district. These issues should be contested on the merits.

In the *Railroad Commission* case, the Supreme Court took another step toward limiting the scope of the *quo warranto* act, by following the *Colorado Eastern* case, and applying the law, applied in that case, between two railroad companies in condemnation of the land of one of them, to a state of facts, that existed in the *Railroad Commission* case, concerning the necessarily following future acts of a public board created by statute to regulate common carriers. The court in the latter case was on debatable ground, as shown by the opinion, but held that the relators, railroad companies, could not use the people's name in *quo warranto* proceedings to redress their own private and, as it appears, future injuries. That case is not controlling here because of the distinction made in the opinion, wherein the court said, the re-

lators "make no claim that if the act is valid the individual respondents are not legal incumbents of the office." No charge was made that there was any defect in their appointment, while that is the very invalidity charged in the present case—the defect in the proceedings under the act, whereby the defendants, in the present case, assume to act as directors; not only defects in their election as directors, but defects in the organization of the district providing for such election. The greater and clearer distinction, however, arises in considering the injury to be redressed, whether wholly private or involving the public interest also, under the facts, circumstances and conditions of each case. It is held in that case that the regulation of the respondent railroad was a matter in which the public had no interest, or would have none when such regulation was attempted or effected, and the opinion lays great stress upon the fact that no attempt had then been made by the commission, and that the complaint of the relators, was wholly anticipatory. The powers given the commission in regulating common carriers, could, in the view of the court, in no way affect the public as a whole, but only the private rights of the carriers. In the present case the powers given the irrigation district affect every citizen who owns lands capable of irrigation within its limits, and within the limits of its powers, and affects the rights of that portion of the public included therein. Furthermore, the general public is interested in having such districts organized for the purpose of reclaiming arid lands, and not for private purposes. Also in seeing that such reclamation, under the act, is lawfully effected, so that the law may not be violated, and so that the lands may not be unlawfully taxed, and so that the warrants and bonds may be lawfully issued, and thereby sell for their full value by reason of their validity. The act itself provides a method of procedure by which the district itself may have the issue of bonds judicially declared to be legal and valid to this end. *Anderson v. Gr. Val. Ir. Dist., supra.* It is further provided that *quo warranto* must be brought within one

year, and if not, the legality of the organization cannot thereafter be questioned. These provisions of the act place proceedings by *quo warranto,* as in the present case, in a class distinct and separate from such a proceeding as in the *Railroad Commission* case.

The third case aforesaid, *State ex rel. Crow v. A. T. & S. F. R. Co.,* in which the question is voluminously discussed by counsel and the court, the purpose of the action by the Attorney General, Crow, was declared to be wholly to redress a private injury to shippers caused by certain switching charges made by the railroads. The injury in that case was a matter wholly between the shippers and the railroads, and the court held the determination of their rights should be had in an action between themselves, and not in the name of or by the people. It is similar to the *Colorado Eastern* case, *supra,* but not controlling here.

On the other hand, it may be concluded from principle and authority that in this particular instance, the purpose of the *quo warranto* proceeding was not wholly to redress a private injury, as held by the lower court.

Spelling on Injunctions and Ex. Rem., volume 2, sec. 1773 (2nd Ed.), says, in regard to the interest of the public in *quo warranto* proceedings:

"That feature adheres to it in all cases, even where the interest of the relator seems to outweigh any public interest in the question at issue, as where it is resorted to to test the title to an office between two claimants; for, while the public may not have any interest in the question whether A or B shall perform the duties and enjoy the emoluments of a public office, still it has an interest that neither A nor B shall usurp a public office. And the same reasoning applies where title to an office in a private corporation is in dispute, since such controversy usually involves the further question of whether a corporate franchise has or has not been usurped."

So, in the present case the public may not be interested in the relator's private injury, or whether the defendants or

others, act as directors of this district, but it is interested that they shall not usurp the right to act in the absence of a lawfully organized district.

High on Ex. Leg. Rem., sec. 619 (3rd Ed.), says:

"When the right to an office or franchise is the sole point in controversy, the specific legal remedy, afforded by proceedings in *quo warranto,* is held to oust all equitable jurisdiction of the case. Thus, the legality of the election of trustees of an incorporated association, and their consequent right to exercise the functions pertaining to their office, and to conduct the affairs of the corporation, will not be determined by bill in chancery, such a case being regarded as appropriately falling within the jurisdiction of the common-law courts by proceedings in *quo warranto.* And since this remedy is applicable the moment an office or franchise is usurped, an injunction will not lie to prevent the usurpation, even though the respondent has not yet entered upon the office or assumed to exercise its functions. In such case the party aggrieved should wait until an actual usurpation has occurred and then seek his remedy in *quo warranto.*"

While the complaint of the relator in this case is based quite generally upon the injury the relator alleges will occur to him individually, much of which might have been omitted, yet there is enough therein to disclose that the franchise was not obtained, as the act provides, and is therefore unlawfully exercised by the defendant, directors; and to disclose, also, that they were not legally elected. And it appears that the sole legal questions involved are the lawful existence of the district, and the consequent right to the franchise which includes the right to exercise the functions of directors.

It is further stated in sec. 684, that:

"The creation of corporate franchises being an attribute of sovereignty to be exercised only by the supreme power in the state, all who presume to exercise such franchises without due authority are liable to proceedings by information in the

nature of a *quo warranto*. And when it is sought to exercise the privileges and powers of a municipal corporation without authority of law, an information is the proper remedy, and the courts will give judgment that the pretended corporation be dissolved. So under a statute authorizing the filing of an information against any person unlawfully holding or exercising any public office or franchise, or when any persons act as a corporation without being authorized by law, an information will lie, and judgment of ouster may be rendered against persons claiming to exercise the functions of officers of a municipal corporation which has no legal existence. And it is the appropriate remedy against directors of a school district to test the legality of its organization. So it may be used to determine the right of respondents to exercise the franchises of a school district and to act as officers of such district."

The unlawful use or the abuse of a corporate franchise by directors of an irrigation district is a public rather than a private wrong, even though the private injury be the thing principally complained of, or that impels relator to move. Mr. High says, and so say all the authorities, that the relator must have some private grievance, sec. 700, id.

It is stated in 32 Cyc. 1415, that:

"In the absence of statutory provision to the contrary, *quo warranto* proceedings are held to be the only proper remedy in cases in which they are available. Thus they are held to be the exclusive method of questioning the legality of the organization or a change in the territory of a *quasi*-public corporation, such as a school district or a drainage district, or of determining the right to hold and exercise a judicial or other public office, or to enforce the forfeiture of a corporate franchise, to attack the validity of the organization of a corporation, or to try title to an office therein; and when the remedy by *quo warranto* is available, it is held that there

is no concurrent remedy in equity unless by virtue of statutory provision."

It is further stated on page 1443, that:

"The general rule is that where the remedy is sought for a public wrong, proceedings should be instituted by and upon the relation of the attorney general; but where the primary purpose is to redress a private injury, the person aggrieved may appear as relator in the information. In a number of cases the rule has been broadly stated that the writ of *quo warranto* does not lie at the suit of a private person, but this rule must be taken to be limited to proceedings of the character under consideration by the court at the time of stating it."

And on page 1424:

"*Quo warranto* is the proper and in the absence of statute the exclusive proceeding to determine the question of the legal existence or validity of the organization of a municipal corporation, such as a city or village, a township, or a school district; and in such proceedings it may be shown that the incorporation is void because of fraud in securing the charter or in the organization of the municipality."

Again on page 1462:

"In an action against an individual for exercising unlawfully an office in a municipality, not only the question of the legal existence of the office, but that of the corporation itself, may be tried and decided."

Hence it seems the relator has no other remedy, and, that he has a right, that has been and will be further invaded, is undisputed. In fact the main point urged against him is that it is his private right alone that has been invaded, and that no public right or interest is involved.

In the case of *Renwick v. Hall,* 84 Ill. 162, 164, the court dismissed a bill in equity, and held that a *quo warranto* proceeding was the proper remedy by owners of lands within

a proposed school district who attacked the legality of its organization. The court said through Justice Dickey:

"We find no grounds in this bill upon which to found jurisdiction in a court of equity. The objections presented to the regularity of the proceedings called in question are merely technical. If these objections be fatal, there is a complete remedy at law.

"By our statute, an information in the nature of a *quo warranto* will lie where 'any association or number of persons shall act within this state as a *corporation* without being *legally* incorporated.' If it be true, as alleged in this bill, that a new district has never been created under the law, in such case the legal existence of this *quasi* corporation can be tested and its illegality established by proceedings under this statute."

While the provision of the Illinois statute is not exactly the same as ours, it seems that the rights given under our *quo warranto* statute are equally as broad.

It may seem that, as the legality of the district is charged, the district itself should have been the defendant, but Mr. High says, sec. 709a:

"Upon an information to determine the legality of the existence of a municipal corporation, the information charging that it was illegally organized, it is unnecessary to make the corporation itself a respondent, since the corporate existence is denied. In such case the persons who assume to act as officers, or to exercise the franchise of the supposed municipality, are the only necessary respondents to determine the validity of the incorporation."

The judgment is therefore reversed with the privilege to relator to amend as he may be advised.

[No. 3889.]

ELLIS V. GIBBONS ET AL.

1. PARTY—*Who Is.* Mrs. Ellis, having recovered a judgment against Gibbons, levied her execution upon certain shares of corporate stock, as the property of Gibbons. Gibbons had previously pledged the stock, but had obtained a decree entitling him to redeem from the pledge. Subsequent to the levy of Mrs. Ellis' execution, Gibbons assigned the stock to Bordeleau, and Gibbons and Bordeleau interposed a motion in the case in which Mrs. Ellis had recovered judgment, to quash her levy. No objection was taken below to the appearance of Bordeleau in this motion. Upon this ground, and because the relief which he sought by his motion was precisely the relief which would have been awarded to him if he had formally intervened, with success, he was regarded and treated, upon error brought, as a proper party below, though it was said that he should have proceeded by bill in equity, or by petition in intervention. (447, 448)

2. APPEAL AND ERROR—*Where Error Lies—Final Judgment.* An order quashing the levy of an execution upon corporate stock is of the same effect as a decree obtained by an equitable suit, or by petition in intervention; and one who in this irregular manner obtains such relief, will not be heard to question the right of his adversary to a review of the order, upon error. Levy upon corporate stock standing upon the books of the corporation in the name of another than the execution defendant. Also, cotemporaneously with the levy, garnishee process served upon the corporation, and an answer showing that the execution defendant was entitled in equity to certain shares in the corporation. An order quashing the levy operates *prima facie* as a discharge of the garnishee and is therefor reviewable upon error by the express provisions of the code (Mills' An. Code, sec. 141, Rev. Code, sec. 157). (458-460)

3. EXECUTION—*Equitable Interest in Corporate Stock Leviable.* Sections 4167, 4172, Mills Stat. (Rev. Stat., secs. 3617, 3622), and sec. 140, Mills Code (Rev. Code, sec. 156) are to be considered as *in pari materia.* The interest of the pledgor in corporate stock may be taken in execution in the manner prescribed by these provisions of the statute, even though nothing appears in the books of the corporation to show such interest. (461-464)

The stock is leviable, even though the pledgor's right is evidenced by an equitable decree, from which an appeal still lies. (464, 465)

The shares are not, after such decree, *in custodia legis.* It is not necessary for the sheriff to disturb the pledgee's possession of the stock certificate, nor need notice of the levy be given to the execution defendant. (466)

Complying with the statute such possession as is possible, and such as is contemplated by the statute, is secured. (463)

The proceedings taken by the creditor set forth, and held to show a substantial compliance with the statute. (465)

Error to Denver District Court. HON. GEORGE W. ALLEN, Judge.

MESSRS. BICKSLER & BENNETT, MESSRS. BARTELS & SILVERSTEIN, MESSRS. DANA & BLOUNT for plaintiff in error.

* Reversed S. C. 53 Colo.

MR. T. J. O'DONNELL, MR. J. W. GRAHAM, MR. CANTON O'DONNELL for defendants in error.

On petition for rehearing. Petition denied.

Per curiam.

The facts necessary to an understanding of this case are substantially as follows:

Mrs. Ellis (formerly Mrs. Prince), plaintiff in error, made a loan to Mr. and Mrs. Gibbons, taking as security therefor a trust deed on real estate. On default of payment, foreclosure proceedings were had, the trust deed being treated as a mortgage, resulting in a deficiency judgment against the Gibbonses for $9,500, dated February, 1905. At and subsequent to the time of the foreclosure proceedings aforesaid, Joseph Gibbons claimed to be the owner of 3,333 shares of the capital stock of The Joseph Gibbons Mining & Milling Company, which stood on the books of that corporation in the name of one John F. O'Connor. Gibbons had brought legal proceedings against O'Connor to recover the stock, which resulted in a decree against Gibbons, but, upon appeal to the Supreme Court, said judgment was reversed and the cause remanded to the District Court for a new trial, the Supreme Court holding that Gibbons had a right to show that the bill of sale of said stock, which appeared to be absolute, was in fact a mortgage or a pledge—*Gibbons v. O'Connor et al.*, 37 Colo. 96, 86 Pac. 94, 11 Ann. Cas. 323. Upon the second trial, the District Court, on June 6 or 7, 1907, rendered judgment in favor of Gibbons—finding that the transfer of stock to O'Connor was a pledge to secure payment of an indebtedness for money borrowed; that Gibbons was the owner of said stock, subject to the lien of O'Connor—and gave Gibbons ninety days in which to redeem the shares of stock by payment of said indebtedness, amounting at that time to about $5,000, payment to be made to O'Connor or into the registry of the court. The decree required O'Connor to transfer the

certificates to Gibbons or his assigns, and ordered The Joseph Gibbons Company and Sullivan, its president, to transfer the shares of stock on the books of the company "upon the assignment and transfer thereof by the said John F. O'Connor as he, the said Joseph Gibbons, may require or direct," and further provided that in case O'Connor, within thirty days, bring the shares of stock into the registry of the court, duly assigned to Gibbons, to be delivered upon payment of the amount due into the registry of the court for O'Connor's use, and thereupon Gibbons fail to perform the decree by paying the sum of money awarded, the right of redemption as fixed in the decree should be at an end, and the cause stand dismissed. On June 7th, Mrs. Ellis caused an execution to be issued on her deficiency judgment against the Gibbonses, under which, on June 10th, a levy was made or attempted to be made by the sheriff upon the interest of Gibbons in the mining stock in question. A bill of sale is found in the record, by which it appears that on August 2, 1907, Gibbons sold the mining stock to Joseph Bordeleau "in consideration of $5 and other valuable considerations," and which, for identification of the stock, refers to the aforesaid litigation and decree in *Gibbons v. O'Connor,* and authorizes and directs the clerk of that court to deliver the stock to Bordeleau, and directs the secretary of the mining company to make the transfer on the corporate books and issue certificates to Bordeleau. September 9th, while the sheriff was advertising the stock for sale under said levy, Gibbons filed a motion, in the *Ellis-Gibbons* action, to quash the levy and the sheriff's return thereof. Bordeleau joined in said motion. September 10th, the motion to quash was sustained. To review this judgment or order quashing the levy, the case is brought here by writ of error.

1. Prior to the transfer of this cause by the Supreme Court to this court, defendants in error filed a motion, the purpose of which was to dismiss and recall the writ of error, for the reason, as therein alleged, that the Supreme Court was without jurisdiction to hear and determine the matters brought

up by the writ, the theory of the movers being that the order of the trial court quashing or setting aside the levy was not a final judgment, and for that reason was not reviewable by writ of error. The Supreme Court denied the motion, with leave, however, to defendants in error to again raise the same on final hearing. We are therefore required, at the threshold, to determine a jurisdictional question. Section 406 Mills' Ann. Code provides that writs of error shall lie from the Supreme Court to every final judgment of any court of record. Section 221 defines a judgment as "the final determination of the rights of the parties in the action or proceedings." Section 141 provides that writs of error may be prosecuted from any final judgment or order in garnishment proceedings, as in other civil cases.

From what has already been said, it will be seen that neither Mr. nor Mrs. Gibbons had any apparent interest in the stock at the time they filed their motion to quash or recall the levy, as they had parted with their interest therein by sale to Bordeleau. Bordeleau was not a party to the Ellis-Gibbons foreclosure proceeding, nor to the Gibbons-O'Connor litigation, relative to the mining stock, and was not made a party thereto, unless considered a party by virtue of the proceedings taken herein to quash the levy. His appearance is in the nature, though not in the form, of an intervention. But in as much as no objection was made in the court below to his joining with Gibbons in the motion to quash the levy, we shall assume, for the purposes of this case, that he was a proper party to the proceedings—as he was, in fact, the real party in interest, and the only moving party ostensibly having a pecuniary interest in the stock. Notwithstanding the form in which this proceeding is brought, it is obvious that the judgment or order quashing the levy, for all practical purposes, meant to Bordeleau precisely what a judgment in his favor as intervenor, or in an equity proceeding brought to restrain the sale of the stock would have meant, and from such a suppositious judgment, clearly, an appeal would lie. If it be

conceded that the ruling of the trial court upon the motion to quash the levy is not, strictly speaking, a final judgment or decree, as the phrase "final judgment" is ordinarily understood, nevertheless, it undoubtedly has the force and effect of a final judgment, in that it has finally disposed of the controversy involved, to-wit, the lien of the execution acquired or preserved by the levy, and the more important question as to whether the interest of Gibbons in the stock was subject to levy and sale under execution at all. Although under the same execution, another levy on the same property might possibly be made, the priority of the lien acquired by the levy in question would probably be lost, and plaintiff in error thereby deprived of a substantial right. But it cannot be assumed that the court did not hold that the stock was not subject to the execution, and that ruling *res adjudicata* as against another levy. From the nature of the case, the doubtful and difficult questions presented, and the valuable property rights involved, it is evident that a summary proceeding such as this, where the issues are not made by appropriate pleadings, is not well adapted to secure a fair trial and determination of such issues. We think the proceeding should have been in equity, or perhaps by formal intervention in Bordeleau's behalf, but inasmuch as he has seen fit to join with Gibbons in the motion to quash the levy, and thereby submit questions which should have been raised in a more formal proceeding, and has secured an award in his favor, in the nature of, and having the force and effect of a final judgment, he may not successfully dispute the right of his adversary to have the same reviewed by writ of error. We will regard the substance of the proceeding, rather than its form, and treat it accordingly.

As was said in *Balfe v. Rumsey, et al.*, 55 Colo. 97, 133, Pac. 417, 419, Ann. Cas. 1914C 692: "The motion which plaintiff in error did file must be treated as equivalent to, and a substitute for, a bill in equity, and the judgment of the court * * * reviewable here."

If the authority of the trial court to quash a levy is purely discretionary, and, as contended for by defendants in error, not subject to review for error or abuse of discretion, either by writ of error, certiorari, or otherwise, then it is manifest that a trial court might, through error as to the law, or by the grossest abuse of its discretion, altogether prevent a judgment creditor from collecting the judgment.—*Pontius v. Nesbit,* 40 Pa. St. 309.

Furthermore, the record shows that in connection with the usual statutory proceedings incident to levy upon stock in a corporation, garnishment writs in aid of the execution were served upon The Gibbons Consolidated Mining & Milling Company, O'Connor (the pledgee), and others, to which answer was made by the president of the corporation, in which, in response to the interrogatories, as well as to the request made by the sheriff for information as to any stock held by Gibbons, or in trust for him, the president of the company stated that there was no stock standing on the books of the company in the name of Gibbons, nor of anyone else to his use or in trust for him, but further stated that a decree of court had been rendered in the *Gibbons-O'Connor* suit aforesaid, and the substance of the decree, to-wit, that it was there decided that Gibbons was the owner of stock standing on the books in the name of O'Connor; that O'Connor was pledgee; that the officers of the company were by said decree required to reissue the stock to Gibbons, or as he might direct, upon redemption as provided, and asserted the willingness of the company to comply with the decree. Upon this showing, the final order of the court quashing the levy, *prima facie,* at least, operated as a discharge of the garnishees, and such an *order* is made reviewable by the special provisions of section 141, Mills' Ann. Code. That provision of the code is not relied on by plaintiff in error, but, without expressly holding that of itself it is sufficient to sustain the writ, we think it may well be considered in connection with all other matters in aiding to resolve, in favor of the plaintiff in error, the

serious doubt raised by decisions of the Supreme Court in *Good v. Martin,* 2 Colo. 292, and *Rockwell v. Dist. Ct.,* 17 Colo. 118, 121, 29 Pac. 454, 31 Am. St. 265, as to whether the judgment assailed may be reviewed upon writ of error. The rule is well established that where doubt exists as to the right of review, such doubt should be resolved in favor of a review, where substantial rights are involved. If we have erred as to jurisdiction, an adequate remedy is provided.

The following additional authorities support our conclusion that the ruling of the trial court here under consideration is so far a final judgment as to be reviewable: *Corning v. Ryan,* 3 Colo. 525; *Daniels v. Daniels,* 9 Colo. 133, 140, 10 Pac. 657; *Hutchinson v. McLaughlin,* 15 Colo. 492, 25 Pac. 317, 11 L. R. A. 287; *Martin v. Simpkins,* 20 Colo. 438, 38 Pac. 1092; *Tomboy v. Dist. Ct.,* 23 Colo. 441, 445, 48 Pac. 537; *Standley v. Mfg. Co.,* 25 Colo. 376, 379, 55 Pac. 723; *State Bank v. Plummer,* 46 Colo. 71, 102 Pac. 1082; *Smith v. McCourt,* 8 Colo. App. 146, 157, 45 Pac. 239; *McKercher v. Green,* 13 Colo. App. 271, 58 Pac. 406; *Mackaness v. Long,* 85 Pa. 158, 162; *Ins. Co. v. Sturges,* 33 N. J. Eq. 330; *Baker v. Pierson,* 5 Mich. 458; *Bristol v. Brent,* 35 Utah 213, 99 Pac. 1000. We are aware that some of the decisions are based on code provisions not altogether like our code.

2. Another point raised on behalf of defendants in error is that the interest of Gibbons in the stock was not subject to levy and sale on execution. This contention seems to be predicated upon the assertion that the only right which Gibbons had in the stock was an "equity of redemption" or "the equitable right to redeem the stock" from the pledge to O'Connor; that Gibbons was not the owner of the stock; that his rights were inchoate only. The latter position can best be stated by quoting from the brief of defendants in error:

"The rights of Gibbons were inchoate; they began with and by reason of the facts stated in the opinion in 37th Colo., but they were not in full existence or operation during the time the battle pending between him and O'Connor waged,

and the decree did not, of itself, restore them to such full existence or operation until and unless its terms were complied with."

We cannot yield to the statement contained in the foregoing quotation. The actual ownership of the stock at all times by Gibbons, notwithstanding the pledge thereof to O'Connor, did not arise from nor begin with the decree or judgment of the court. Whatever right Gibbons had, the law gave. The court simply declared it. Gibbons prevailed in his action because of the fact, as found and determined by the court, that the transfer of the stock from Gibbons to O'Connor, although absolute in form, and so appearing upon the books of the corporation, was, nevertheless, a pledge, and to be so construed. In effect, the decree declares that while the legal title passed to the pledgee, it was held by him for the benefit of the pledgor, in whom the general property still remains—*Wilson v. Little,* 2 N. Y. 443, 51 Am. Dec. 307; *Irving Park Ass'n. v. Watson,* 41 Or. 95, 67 Pac. 945; *Mitchell v. Roberts* (C. C.), 17 Fed. 776, 5 McCreary 425; *Gay v. Moss,* 34 Cal. 125, 132; *Dungan v. N. J. Mut. Ben. L. Ins. Co.,* 38 Md. 242, 252; 31 Cyc. 791, and cases cited.

Nor do we agree with counsel's contention that because corporate stock is a chose in action, and Gibbons' interest therein a mere right to redeem it from the pledge which is also a chose in action, a levy under execution could not be made thereon. Under the provisions of our statute—section 993, Mills' Ann. Stats.—shares of stock in a corporation are deemed to be personal property. This doubtless applies to the shares or interest which the stockholder has in the assets of the corporation, and not only to the certificates, which are held to be mere tokens or evidence of the shares or interest.—*Mountain Water Works v. Holme,* 49 Colo. 412, 428, 113 Pac. 50; *City and County of Denver v. Estate of Charles M. Hobbs, et al.,* — Colo. ——, 144 Pac. 874, handed down December 7, 1914; *People ex rel. v. Goss & Phillips Mfg. Co.,* 99 Ill. 355, 363. The statute also provides that such rights

and shares of stock may be levied on and sold under execution, and prescribes the method.—Sections 4167 and 4172, Mills. Ann. Stats. The Civil Code also provides that the credits and effects, *choses in action,* and other personal property, of a judgment debtor in the possession or under the control of any third person may be levied upon and taken under execution, to the same extent and in the same manner as they may be taken under attachment and garnishment proceedings.—Section 140, Mills' Ann. Code. We think the provisions of the statute and of the code are to be considered *in pari materia,* and, as such, applicable to the circumstances of this case so far as the levy is concerned, and that even though the stock be considered as a chose in action, as held by many courts, and the right of Gibbons an equity of redemption, nevertheless, it is subject to seizure under execution in the manner provided by the statutes and the code. The shares of stock, or interest, although personal property, are not capable of manual delivery, and therefore cannot be taken into the actual possession of the officer. This fact explains the reason for the statutory provisions as to levy, somewhat analogous to a levy upon interests in real estate. In this case, as there was no stock standing in the name of Gibbons on the company books, no showing on said books that any of the stock standing on the books in the name of a third person was held "in trust for or to the use of" said Gibbons, it was impossible for any officer of the corporation to certify from its books as to the true ownership of the stock sought to be levied upon; but it is evident from the record that not only the president of said corporation, but the sheriff, had information of the decree of the court, and the real interest of Gibbons as therein declared, and we think the garnishment proceedings and the answers made by the corporation to the interrogatories therein, were appropriate in aid of the execution, and that, altogether, the levy as made was valid. In *Metzler v. James,* 12 Colo. 322, the question as to whether an equity of redemption in personalty is subject to levy and sale under

execution was discussed. In that case an attempt had been made to levy upon personal property consisting of a stock of drugs of which the mortgagee had the legal title and possession. The court said:

"The maintenance of the second proposition depends upon whether an equity of redemption in personalty is subject to levy and sale under execution. It is not subject thereto at common law."

It is there shown that an equity of redemption in personalty may be subjected to levy and sale under execution, by the use of the appropriate provisions of the statute and code. We think that case is ample support for our conclusion that the equity of redemption of Gibbons as pledgor of the stock was subject to levy and sale under execution. If plaintiff in error failed in any respect to follow the course pointed out, that failure is not in evidence, nor does it appear that she is barred from still pursuing the necessary course. The stock, however, not being capable of manual delivery, it was not necessary, nor possible, for the sheriff to take physical possession thereof. It was not necessary for him to disturb the actual possession of the pledgee of the certificates of stock. Such possession as was possible, and as the law contemplates, was secured by the sheriff by virtue of compliance with the provisions of the statute and the code. In this connection, we quote the language of Mr. Justice Dickey in *People ex rel. v. Goss & Phillips Mfg. Co.*, 99 Ill. 355, 363, having under consideration a levy upon capital stock under execution:

"The property of a stockholder consists of his right to a share in the net assets of the corporation, proportionate to the number of shares to which he has title. He has not, personally, a right as such shareholder, to the custody or manual possession of any part of such assets. The corporation has the custody of the whole, and holds possession of his share for him. His title is evidenced by his stock certificates. This title can be passed from him to another only by transfer thereof upon the stock books of the corporation. The cor-

poration holds possession of each share of each shareholder in whose name the stock stands on the books of the corporation. The possession of the corporation as to the share of each stockholder, is, in one sense, the possession of the shareholder, and is the only possession which a shareholder can lawfully have, and is the only possession which any grantee of any shareholder can acquire; and such possession by a vendee of a shareholder can only be obtained by a transfer of the stock to him *upon the books* of the corporation. Until that transfer be made, the possession of the corporation is the possession of him in whose name the stock stands upon the books. The certificate of stock does not constitute property in the assets of the corporation. * * * When the sheriff has exhibited his execution, and on demand has received from the corporation, by virtue of his execution, a certificate of the shares standing in the name of the execution debtor, from that moment the possession of the corporation becomes, in fact, the possession of the sheriff, or rather a possession for the sheriff, in whom the title to the stock, by virtue of such actual levy, is, for the time, invested. The sheriff then has all the possession which the shareholder had before the levy. By giving the certificate provided for, * * * the corporation, in substance, agrees to hold possession for the sheriff," etc.

Under the joint provisions of the statute and the code, it appears to us that an equity of redemption in corporate stock may be levied upon and sold under execution with like effect as an equity of redemption in real estate may be sold under execution, by compliance with the statutory requisites. The decisions of courts of different states are in hopeless conflict on this question, and citations thereto would be of slight benefit.

3. We do not regard the fact, that at the time the levy herein was made, the time for an appeal from the decision of the court in the *Gibbons v. O'Connor* suit had not lapsed, as important, in the absence of any contention or showing that an appeal had been taken or writ of error prosecuted which

would operate as a supersedeas. The levy could take nothing that did not belong to Gibbons, the execution debtor. The assertion that in view of the litigation, the questionable character and amount of Gibbons' interests in the pledged stock, and the possibility of an appeal or writ of error, would, in case of forced sale, result in a sacrifice of such interest because no one would buy, may be, and doubtless is, persuasive, and, for some purposes, should be considered; but we think that fact is not conclusive of the right to sell.

4. Defendants in error complain of the levy and the return made by the sheriff on the execution, pointing out certain alleged defects therein. A careful scrutiny of the manner of the levy, including the garnishment proceedings, leads us to the conclusion that the provisions of the statute were substantially complied with, and that the return of the sheriff correctly recites the levy made by him. Long before Bordeleau purchased the stock from Gibbons, the sheriff had delivered to the president of the corporation a copy of the execution, with a certificate that pursuant thereto he levied upon and seized all the interest or shares in said corporation belonging to Gibbons, and in response to the sheriff's request, and the interrogatories in the garnishment writ, the president of the corporation had furnished the sheriff with certificates and affidavits, stating the number of shares which the court had decided were held in trust by O'Connor for the use of Gibbons, and these, with the sheriff's return, when filed in court, recited accurately and in great detail all the pertinent facts concerning the stock. Whatever rights Bordeleau has in the stock, it must be considered, for the purpose of this hearing, he took with knowledge or notice of the levy. It is also urged that no notice was given Gibbons of the attempted levy upon the mining stock. We have no statute which in terms requires notice to the defendant in execution prior to levy of the writ.—*Victor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 Pac. 351. Failure to give notice of the levy to the execution debtor was not fatal.

5. It is further urged that the stock was *in custodia legis,* and therefore not subject to levy. We think it was not *in custodia legis* nor *in gremio legis* at the time of the levy, granting that it had been so situated prior to the decree. As we have heretofore said, all matters in issue as to the ownership of the stock were settled by the decree. That litigation was at an end. The duty of the court in respect thereto had been performed. Neither the court nor any officer thereof was in possession of the stock. The corporation was in possession of the shares for Gibbons and his pledgee. O'Connor was in possession of the certificates, but what interest he had in the stock was held by him in trust for Gibbons, although coupled with an interest in himself to the extent of the debt for which it was pledged. By virtue of the decree, the parties might have used the clerk of the court, or its registry, as a medium of exchange of the redemption fund for the certificates. They were not required to use either, and there is no evidence that they did. There is no conflict, and no apparent possibility of conflict, between the court having jurisdiction of the execution, and the court that had exercised its jurisdiction in deciding the controversy as to the ownership of the stock. For that reason, the numerous authorities cited by the eminent counsel for defendants in error in his persuasive brief, involving conflicts between state courts and federal courts, or different state courts, are not controlling, if in point at all, in considering the question as to whether the property was in custody of the law. It was said in *Joseph v. Baldridge,* 43 Mo. App. 333, at 337:

"Goods are not in possession of the law simply because there is some litigation, touching their true ownership, pending in the courts."

A fortiori, it may be said that property is not in the custody of the law merely because there has been some litigation touching its ownership.

In deciding the questions discussed in this opinion, we have sought to avoid a decision on any matter, that, by be-

coming the law of the case, may embarrass the court on a new hearing or trial of this, or any other appropriate proceeding, in determining the relative rights of all parties interested in the stock the subject of this controversy. While we hold the levy valid, and that it seized any interest in the stock belonging to Gibbons, the execution debtor, we do not decide what that interest was, nor what interest Bordeleau acquired by his bill of sale. *Prima facie,* that instrument is an absolute transfer of the stock. It may, in fact, be a mere pledge, as was the bill of sale from Gibbons to O'Connor. Counsel, we think, suggest that such is, or may be, its true character, and if so it is conceivable that Bordeleau may be substituted for, or take the same position as O'Connor, with regard to the stock, and for that reason, or some other equitable reason, be entitled to priority over the lien of the execution creditor, to the extent of his investment. We gather from the briefs that at some time subsequent to the levy, that investment was approximately $5,000, but there is no proof that he paid anything. The condition of the record is such that we feel constrained, in reversing the judgment, to remand the cause in such form that the property rights of all the parties may be determined upon their merits, and after a full hearing.

Judgment reversed and cause remanded for further proceedings in conformity with the views herein expressed. The district court is directed to vacate the order quashing the levy.

Reversed and Remanded.

[No. 4047.]

SNIDER ET AL. V. OSTRANDER.

1. EQUITY—*Public Lands—Mistake of Land Officers Corrected.* Equity has always assumed jurisdiction to grant relief where by mistake of the land officers of the United States, lands to which, one party is entitled, have been patented to another. (470)

2. —— *Decree—Cancelling Patent.* The decree in such case should not cancel the patent, but declare the party who has obtained the title trustee for the one entitled thereto. (472)

Error to Grand District Court. HON. CHARLES MCCALL, Judge.

MR. GEO. B. CAMPBELL for plaintiffs in error.

MESSRS. HOWARD & MCCRILLIS for defendant in error.

BELL, J.

This is an equitable action brought in the District Court of Grand County in the nature of a suit to quiet the title of Joseph N. Ostrander, defendant in error, plaintiff below, to certain lands in township 1 N., range 76 W. 6th P. M., in said county, Colorado. A decree was rendered and entered on the facts found by the court to be admitted in the pleadings, or in what is generally termed a judgment on the pleadings.

If the complaint should be taken as confessed, it would seem to be conceded that Daniel N. Ostrander, the father of said Joseph N. Ostrander, settled upon certain lands in the township aforesaid, resided and made extensive improvements thereon, and purchased the same under the pre-emption laws of the United States, and the government of the United States endeavored to convey the same to him by its patent, but by inadvertence and a mutual mistake, conveyed to him instead other lands in said township, which are situated about one mile east of the lands intended to be patented; also, that James M. Spring, by his administrator, conveyed to said Daniel N. Ostrander the legal title to certain other lands in said township, which legal title was conveyed to said Spring by the government of the United States by its patent issued

therefor through an inadvertence and mutual mistake; that said Spring actually settled and resided upon, improved and claimed under the homestead laws of the United States different lands in said township from those patented to him, in which he owned the equitable title, and to which he sought to secure, through the patent issued to him, the legal title which was intended to be conveyed by his administrator to said Daniel N. Ostrander as aforesaid; and, further, that James W. Snider, predecessor in interest of the plaintiffs in error, defendants below, settled upon, improved, claimed and purchased from the United States, under the pre-emption laws, still other lands in said township, and attempted to obtain the legal title thereto from the government of the United States, and the government intended and endeavored to convey him such title, through its patent, but by inadvertence and mistake as aforesaid, conveyed him the premises in controversy herein, which are situate one mile east of those intended to be patented to him, and which were settled upon, improved, claimed and equitably owned by said Daniel N. Ostrander and James M. Spring at the time the patent therefor was issued to him.

The contentions of the plaintiffs in error, heirs at law of said James W. Snider, are chiefly, among others, that the government of the United States, and not the defendant in error, is the proper party to bring a suit for the cancellation of the patent, and that the findings of the United States Land Office, that Snider had occupied, settled upon and improved the land described in his patent, are *res adjudicata* and binding upon the parties and the court.

We have examined the defenses set up by the plaintiffs in error and find them insufficient to defeat the equities set forth in the complaint. Their contention that the findings of the United States Land Office, made in an *ex parte* proceeding, that James W. Snider had occupied, settled upon and improved the land described in his patent, are *res adjudicata* and binding upon the parties and the court, is untenable

The rule contended for applies to error of judgment in contests before the land officers where the only remedy is by appeal within the Land Department; but there has always existed in courts of equity the jurisdiction to correct mistakes where lands have been given one claimant which upon unmistakable facts belong to another: *Johnson v. Towsley,* 13 Wall. 72, 20 L. Ed. 485; *Moore v. Robbins,* 96 U. S. 530, 24 L. Ed. 848; *Shepley v. Cowan,* 91 U. S. 340, 23 L. Ed. 424.

Plaintiffs in error also insist that the defense of the statutes of limitations was set up in their answer and not replied to, and, therefore, was taken as confessed. We do not think that the statutes pleaded or argued by counsel have any application to the facts involved in this controversy.

Again assuming the allegations of the complaint to be true, the positions urged by the plaintiffs in error on the merits of the controversy are utterly inequitable, and founded upon a common mistake made in the official survey of township 1 N., range 76 W. 6th P. M., by which a strip of land extending the entire length of said township, north and south, one mile in width at the north and running to a point at the south, and lying between townships 1 N., ranges 76 and 77 W. of the 6th P. M., was left unsurveyed, and when the filings by the settlers hereinbefore mentioned were accepted, no recognition of this unsurveyed strip was taken by the land officers; and by reason of said officials ignoring the existence of said triangular strip, they furnished the settlers aforesaid with descriptions of the public domain quite a mile east of the lands respectively settled upon, improved and purchased by them. The defendant in error, according to his complaint, seeks only to obtain the legal title to lands possessed and equitably owned by him and his predecessors in interest. The very suggestion of the conditions as set forth in the complaint, if true, ought to satisfy any litigant that he or she could have no standing on the merits in a court of equity, and a common duty should dictate to parties so situated that they lend all

voluntary assistance on demand to correct such errors as are herein complained of so as to permit each one to secure a patent to the premises upon which his settlement, improvement and residence were established; to accomplish any other result would be a flagrant defeat of the cardinal purposes of the homestead and pre-emption laws of the United States, which are intended to provide 160 acres of government domain to such qualified citizens of the United States as in good faith settle upon, improve and occupy the same as permanent homes.

The facts averred in the complaint are sufficient to entitle the defendant in error to a decree quieting his title to the premises in dispute and to justify the court in declaring that the plaintiffs in error hold the legal title thereof in trust for the defendant in error, and such relief is permissible under the general prayer of the complaint. The trial court decreed the United States patent to said premises cancelled, and enjoined the plaintiffs in error from thereafter asserting any rights to said premises thereunder. We think the court exceeded its powers in cancelling the patent under the conditions attending this controversy. There is a seeming conflict of authority as to whether the cancellation of a patent can be had upon complaint made by any other than the United States government; but there seems to be no doubt as to the right of the courts, in contests between private citizens in which the United States has no interest or has parted with the legal title to the lands in dispute, to declare the holder of such title a trustee holding the same for the use and benefit of the true and equitable owner of the lands and require a transfer of such title in the manner approved by courts of equity, and we conclude that this is the appropriate remedy and the one that should be applied in this case, if the facts are as herein stated: 26 Am. & Eng. Encyc. of Law (2d Ed.) 397, and note 7, citing many cases; *Boggs v. Merced M. Co.*, 14 Cal. 363; *Gaines et al. v. Nicholson et al.*, 9 How. 364, 13 L. Ed. 172; *Steel v. St. Louis M. & R. Co.*, 106 U. S

447, 1 Sup. Ct. 389, 27 L. Ed. 226; 19 Am. & Eng. Encyc. of Law (1st Ed.) 358, and notes 1 and 2, citing many cases; *Johnson v. Towsley,* 13 Wall. 72, 20 L. Ed. 485; *Moore v. Robbins,* 96 U. S. 530, 24 L. Ed. 848.

In *Shwayder v. Clay,* 24 Colo. App. 336-340, 133 Pac. 420, it has been said that judgments on the pleadings should be restricted; and, as the pleadings in this case, upon which the decree was rendered, are more or less complicated and burdened with technical descriptions which could readily admit of error and mistake, such as is herein complained of, and thereby result to the injury of either or both of the parties—therefore, to avoid any such error or injury that may result therefrom, it is hereby ordered and directed that the decree be reversed and the case remanded with instructions to the trial court to permit the parties to amend their pleadings as they may be advised, and to determine the cause upon such proper evidence as may be tendered and in conformity with the conclusions of law herein expressed.

Reversed and Remanded with Instructions.

[No. 4154.]

CURRY V. EQUITABLE SURETY COMPANY.

APPEAL AND ERROR—*Remand—Time of Application.* Under the statute (Laws 1911, c. 107, sec. 5) thirty days is allowed to either party to a cause transferred to this court, in which to apply for a remand of the same to the Supreme Court. Failure to apply within the prescribed period bars the right, whatever may be the reason of the failure. This court has no discretion in the premises. (474)

Error to Denver District Court. HON. J. H. TELLER, Judge.

MESSRS. BARNETT & CAMPBELL, MR. JOSHUA GROZIER for plaintiff in error.

No appearance for defendant in error.

Opinion Per Curiam.

The above case reached this court in due course, under assignment from the Supreme Court, under § 5, page 268, Session Laws 1911, of the act creating the Court of Appeals.

Within the required time the clerk of this court, by registered mail, notified Barnett & Campbell, attorneys of record for plaintiff in error, of the transfer. Joshua Grozier is also attorney of record, but the former names appear first on the record. No application to remand the case to the Supreme Court was filed by plaintiff in error within thirty days from the date of the notice, as provided by the statute. The notice was mailed October 12th, and registered receipt, signed by Barnett & Campbell, was returned to the clerk by the Post-office Department, showing delivery of the notice to that firm on October 14th. The date of the notice does not appear, but it must necessarily have been on October 12th or prior to that time.

November 12th a motion to remand was filed with the clerk of the court, signed by all the attorneys of record for plaintiff in error. The motion, however, reads in part as follows:

"Now comes the plaintiff in error, by Joshua Grozier, one of his attorneys," etc.

It appears from the motion that Grozier had devoted more attention to this case than his colleagues; that he never had notice until the time he filed his motion, that the cause had been transferred from the Supreme Court to the Court of Appeals; that the case is the outgrowth of cause No. 8160, then in the Supreme Court, entitled *Curry v. Trinkle Automobile Co., et al.;* that it would be to the interest of all parties concerned to have the two cases argued together in the Supreme Court; and that, immediately upon learning of the transfer from the Supreme Court, this motion was filed.

Said § 5 reads in part as follows:

"And immediately upon such assignment and transfer of causes so pending on error, the clerk of the Court of Appeals, shall, by registered mail, notify the parties to each of said

causes or their attorneys of record, of such transfer, and advise them that unless within thirty days from the date of said notice a petition be filed requesting that the same be remanded to the Supreme Court, a waiver by consent will be conclusively presumed of the right or privilege, if any such right or privilege exists, to a hearing and determination of the writ of error by the Supreme Court. * * * But in all cases pending on error thus transferred, wherein no such petition be filed within the 30 days mentioned in the notice, the decision of the Court of Appeals shall, with the exceptions specified in section 6 of this act, be final and conclusive."

There are some matters appearing in the motion, which, if resting in the discretion of the court, would be somewhat persuasive, but we think the legislature has removed from this court the right to exercise any discretion in the consideration of the petition. The statute reserves the right, in either party to the action, to effect a return to the Supreme Court of any case so transferred, by simply filing a petition requesting the same, but at the same time expressly provides that in the absence of such petition consent to the transfer will be conclusively presumed.

The failure of plaintiff in error to file such petition to remand within the time provided, whatever the reasons for such failure may be, bars him from the right to remand, unless within certain exceptions stated in the statute, and leaves the court without jurisdiction to grant the petition.

The motion will be denied.

[No. 4009.]

WHITE v. HARTMAN, ADMINISTRATRIX.

1. CONVEYANCES—*Construed.* A conveyance expressly reserved an equitable lien, called, indeed, a vendor's lien, until all the purchase money should be fully paid, "when this deed shall become absolute." *Held,* the manifest intention that the deed should not become absolute until full payment of the purchase money. "Grantee" construed to mean "grantor," where this was the manifest intention. (476-478)

2. SEAL—*Voluntary Association,* is not required to have a seal. (480)

3. NAMES—*One May Assume Any Name,* at his pleasure, and may transact business therewith. He will be responsible under such assumed name. (482)

4. HOMESTEAD—*Claim Of—Effect.* A claim of specified premises, by qualified person, filed in the recorder's office, takes precedence of a general lien, e. g., the lien of a judgment under which no levy has been made. (482)

5. —— *Subordinate to an Equitable Lien,* for the purchase money of the premises, evidenced by reservation contained in the deed by which they are conveyed, and by the covenant of the grantee in such conveyance. (482, 483)

6. CONTRACTS—*Construed.* Certain promissory notes held to be the notes of a corporation named, and not the individual notes of the principal officer thereof. (476-482)

Error to Denver District Court. HON. GREELEY W. WHITFORD, Judge.

MR. JOHN P. BROCKWAY for plaintiff in error.

MR. WM. B. TEBBETTS and MR. HERBERT M. MUNROE for defendant in error.

BELL, J.

On the 1st day of October, 1902, The Ancient Order of Emethachavah, a communistic corporation, through Franklin P. White, C'Chief and its sole trustee, purchased from James W. Weir of Denver, Colorado, lots 16 and 17 in block 2 in Weir Addition, State of Colorado, for $1,200 and gave 70 serial notes in payment therefor. The said Weir executed and delivered a warranty deed conveying said lots to Franklin P. White as sole trustee and C'Chief of The Ancient Order of Emethachavah. The deed contained the following notice

of intention to hold a lien on the property for the purchase money:

"A vendor's lien, however, is hereby expressly retained by said first party on the above described property, until all of said notes, aggregating twelve hundred dollars, are fully paid, when this deed shall become absolute."

Three hundred and sixty dollars of the purchase price was afterward paid to Weir, leaving some $840 evidenced by that series of said notes from 27 to 70, both inclusive, unpaid, with interest thereon. On the 10th day of January, 1908, said White as sole trustee of The Ancient Order of Emethachavah, by quit claim deed, for $1.00 and other consideration, conveyed said lots to his principal, The Ancient Order of Emethachavah. On the 31st day of January, 1910, the said Franklin P. White, sole trustee and C'Chief of The Ancient Order of Emethachavah conveyed said lots from himself, as trustee, to himself, as an individual, for the consideration of $1.00 and other valuable considerations. Said Franklin P. White as an individual did on the 9th day of February, 1912, long after the commencement of this suit, enter on the margin of the record of his said quit-claim deed, in the recorder's office, a claim of homestead, and avers, first: That the promissory notes given for the purchase money of said lots were the personal notes of said White, and denies that The Ancient Order of Emethachavah ever assumed to pay or become responsible for the payment thereof; second, that he holds a homestead on said premises, which is superior in right to the claim of the defendant in error; third, that on the 25th day of November, 1907, he was, by a U. S. bankruptcy court, in Denver, Colorado, discharged and released from all of his debts, and asks that the defendant in error be restrained and enjoined from selling said lots for the payment of the purchase money, for the reasons aforesaid. A reply denied the allegations in the answer of plaintiff in error, and set up much new matter. Judge Whitford of the Denver District Court took the evidence and, upon the final hearing, denied the relief

prayed for by the plaintiff in error, and entered judgment for the defendant in error, and a decree ordering said lots sold for the purchase money, interest and cost of suit to be paid therefrom, etc. During the distincter days of this ancient order these notes were treated and intended to be the notes of the Ancient Order of Emethachavah. It was the Ancient Order that purchased the lots. It was its sole trustee, manager and C'Chief that made the purchase and executed and delivered the notes. The deed which the C'Chief accepted and under which the Ancient Order claims title states on its face that the purchase money was not paid, and the grantor expressly retained a "vendor's lien" on said property until all of the said notes were paid, "when this deed shall become absolute." It is manifest from the deed given and accepted that it was the intention of the grantor and the grantee that the deed should not become, ever absolute, until all of these notes were paid. On the 16th day of October, 1902, the grantor and grantee, under the title of Franklin P. White, trustee, gave notice and made ample covenants in writing, which were duly executed, acknowledged, delivered and recorded in said recorder's office, wherein said conveyance is alleged to have been made without the payment of the purchase money. The said agreement states that the grantee, The Ancient Order of Emethachavah, by its trustee, gave its promissory notes therefor and describes these notes and states in writing that a vendor's lien was reserved and retained by the grantor until said notes and each of them, together with the interest thereon, is fully paid, and further states that, in case the same or any part thereof shall not be paid within thirty days of the time that they may become due, the grantor reserves the right and privilege of foreclosing such lien by an appropriate suit in court, "and on behalf of the grantee in said deed, it is hereby agreed, that all the reservations, rights and privileges aforesaid mentioned or claimed by said grantee (evidently meaning grantor), including the said vendor's lien and the right to foreclose the same are hereby granted and

conceded to him pursuant to justice and equity and the law in such cases provided." This instrument was signed by James W. Wier, grantor, and by Franklin P. White, trustee.

Taking the original deed of these lots with the above instrument, and the purpose seems self-evident to create an equitable lien for the purchase money for these lots. All of the defenses to the enforcement of this equitable mortgage or lien are purely technical, contrary to equity and fair dealing, and untenable in a court of equity.

The evidence discloses that the Denver Fraternity of Emethachavah, a voluntary association, was organized in 1898, and the same was incorporated on the 18th day of March, 1901, under the name of The Ancient Order of Emethachavah. The articles of incorporation provide that The Ancient Order of Emethachavah shall be the chief organization, and all other organizations shall be subordinate to it and shall be under its jurisdiction and control. The articles provide for a C'Chief, who shall hold his office during his natural life, or until his successor is appointed and qualified, and shall be manager of the corporation, and all the title to the property of the corporation shall be vested in him as sole trustee. He is given power to appoint his own successor and advisory director, and is the sole trustee of the organization. The only other officer provided for by the articles of incorporation is an advisory director, without power other than as advisory. The articles further provide that all members of the corporation taking the holy covenant degree of the order shall, upon taking such degree, yield up, grant, convey, remise, release, quit-claim, assign and transfer to the C'Chief all of the property of such member so taking such degree, of every name or nature, real, personal and mixed, which said property shall thereupon become the property of the C'Chief to be held by him in trust for this corporation as aforesaid. The C'Chief is given sole power to provide by-laws for the corporation. The articles also provide that no organization bearing the name of Emethachavah or words

equivalent to it shall be organized or founded except upon the approval and under the direction of the C'Chief of this corporation, and shall be under the jurisdiction and control of such C'Chief. He has sole power to convey its property, etc. After the incorporation of the order, there seems to be no evidence showing an organization of a fraternity as provided for in the articles of incorporation. However, it seems that the C'Chief continued to use the name of the Denver Fraternity of Emethachavah until the latter part of 1904, when the corporation ceased active operations. The bank account of the corporation was kept in the name of the Fraternity, its bills were paid by checks issued in the name of the Fraternity, and it did its general business in the name of the Fraternity. It would seem that, by virtue of the incorporation, the preliminary organization would be merged in the corporation, and that, under the articles, any subordinate organization existing after the filing of the articles of incorporation had to be organized under the jurisdiction of the corporation and under its directions with the approval of the C'Chief. However, the C'Chief seemed to be given absolute power, by the articles of incorporation, as trustee, and he assumed absolute power, it would seem, in the Fraternity, and always signed his name as sole trustee of the Denver Fraternity of Emethachavah. He seems to have used the names of the Ancient Order of Emethachavah and the Denver Fraternity of Emethachavah, after the filing of the articles of incorporation, as interchangeable, and as meaning one and the same thing. The C'Chief took the deed to the lots in controversy in the name of The Ancient Order of Emethachavah, and gave notes for the payment of the purchase money in the name of the "Denver Fraternity of Emethachavah, by Franklin P. White, sole trustee." A few days later, he joined the grantor in the execution of an agreement giving the grantor, James W. Wier, an equitable mortgage, in which agreement it is stated that the grantee in the deed gave his promissory notes referring to himself as the trustee of The

Ancient Order of Emethachavah; then he specifically grants, in behalf of the grantee named in the deed, a lien for the payment of these promissory notes. When he executed the notes, he impressed a metallic seal thereon with the lettering "Emethachavah, Founded Cosmon 50, Official Seal." He afterward attempted to transfer from himself as trustee of The Ancient Order of Emethachavah said lots, by warranty deed, to himself as an individual, and placed the same seal on the deed as the seal of The Ancient Order of Emethachavah. He testified, when this case was being tried in the County Court of Denver County, that the seal above described was the only one owned by The Ancient Order of Emethachavah or by the Denver Fraternity of Emethachavah. In the trial of the same case later in the District Court, he testified that they had two seals at one time, but that the corporation seal was made over into a notary seal. It is quite unusual, and is not required by law, that a voluntary association shall possess a seal. On the other hand, the statutes recognize a seal for an incorporated company. If, by mistake or lack of information, these organizations provided two seals when but one is usual, it is difficult to see why the C'Chief should have mutilated the one generally used, and have preserved the useless one, and have used the same as the corporate seal. The attending circumstances strongly indicate that the C'Chief stated the actual condition when he testified that the seal placed on the notes and deed was the only seal owned by either association until after this suit was commenced. However, when the identity of this seal became an important question in this case, the C'Chief had a second seal manufactured, and impressed it upon the deed from The Ancient Order of Emethachavah to himself long after said deed had been executed under the old seal, and delivered and recorded. The C'Chief sometimes signed instruments for the corporation, "The Ancient Order of Emethachavah, by Franklin P. White, C'Chief and sole trustee," as he did in the case of the deed from himself as trustee of the corporation to himself as an

individual. He sometimes signed instruments for the corporation: "Denver Fraternity of Emethachavah, by Franklin P. White, sole trustee," as he did when he executed said notes for the purchase money of said lots. He sometimes signed instruments for the corporation: "Franklin P. White, trustee," as he did when he executed the equitable mortgage, as trustee of The Ancient Order of Emethachavah on said lots, to secure the purchase money to the grantor. The different titles assumed by him were self-confusing. He testified that he took the holy covenant degree of the order and divested himself of all property, and vested the same in the C'Chief of the corporation in trust for it. He testified that he was still a member of the order; that he had paid $10,000 in cash for these lots. When cross-examined he admitted that he had meant by that that he had paid $10,000 in to the corporation during the past seven years, and said that he paid the one dollar in cash mentioned in the deed as consideration for the lots. When quizzed by the court, he testified that he did not pay a cent; that he simply made a minute of it; that he did not see how he could hand a dollar to himself; that he was C'Chief of the corporation at the time of the trial; that, at the time he took the deed, he was sole beneficiary member of the corporation; that these lots were the only property he ever owned of a real nature. He testified that all property of the Fraternity belonged to the corporation substantially; that all of the funds of the corporation were kept in the Fraternity's name at the bank, and that all of the debts and obligations of the corporation were paid by check by the C'Chief on the Fraternity account.

The evidence is convincing that, after the incorporation of The Ancient Order of Emethachavah, the C'Chief adopted and generally used the name "Denver Fraternity of Emethachavah" as the business designation or name in which the corporation did business up until late in the year 1904, when conditions made it desirable for him to use the name "The Ancient Order of Emethachavah."

A person may adopt or assume any name in which he prefers to do business, or may consummate an individual transaction in any name he may adopt, and will thereafter be responsible in the assumed name: *Emery v. Kipp,* 154 Cal. 83, 97 Pac. 17-21, 19 L. R. A. (N. S.) 983, 129 Am. St. 141, 16 Ann. Cas. 792.

It is insisted by counsel that a homestead filing takes preference of a general lien on real estate, and we are cited to authorities holding that where the abstract of a judgment of a court of record is filed in the recorder's office as a general lien on the real estate of the judgment debtor, the general lien must give way to the proper filing of a homestead on a specific piece of property to the value of $2,000. That is quite true. If it were otherwise, the holder of a general lien might maintain the same against property many times the value of its incumbrance, and wait for years before making a levy on a specific piece of property for the satisfaction of his claim, and thereby postpone the rights of those entitled to a homestead during the continuance of his lien. However, if a lien holder neglects to subject a specific piece of property to a levy immediately upon the filing of a general lien covering all of the property of a judgment debtor, then one entitled to a homestead right may defeat his lien in part, at least, by filing a claim of homestead preceding such levy: *Weare v. Johnson,* 20 Colo. 366-67, 38 Pac. 374; *Jones v. Olson,* 17 Colo. App. 365-71, 67 Pac. 349.

The lien in this case, however, is not general, but specific and fastened upon the lots purchased and for the purchase money. Claims for purchase money on real or personal property make the equities of the holder of such claims doubly strong and such claims are usually excepted by statute from the exemption laws: 21 Cyc. 509.

Under the conditions of this record, we think it clear that these notes were intended to be, and were, the notes of The Ancient Order of Emethachavah; that the notice of vendor's lien in the deed and written agreement constituted a valid

equitable mortgage in favor of the defendant in error on the specific lots in dispute; that the notes, being those of The Ancient Order of Emethachavah, were not discharged by the order in bankruptcy discharging the plaintiff in error from the payment of his debts; and that the homestead filing of the plaintiff in error on the lots in question is subordinate to the equitable lien thereon for the purchase money.

Finding no reversible error in the record, the judgment and decree of the trial court is hereby affirmed.

Affirmed.

[No. 4065.]

MILLER v. DAVIS.

1. MECHANIC'S LIEN—*Statement—Description—False Call Rejected.* The lien statement described the premises by metes and bounds, as, "commencing at, etc." Considering that in the agreement under which the parties making the improvement were possessed of the premises, the word "six," in this description, was *"thence,"* that the center line of section 13, in which the premises were manifestly situate, nowhere intersects any line of sec. 6, in that, so far as appeared, the parties making the improvement, and who were designated in this statement as owners, owned no other real estate in the vicinity, the false call was rejected. (485, 486)

2. —— *Description of the Building.* The lien statement should describe the structure in respect of which the lien is claimed; but in view of the statutory provision requiring a liberal construction of the act (Rev. Stat., sec. 4043), *held,* a description of the land, omitting any description of the building, is not fatal. (486)

3. —— *Improvements Made by Vendee,* pursuant to the express provisions of his contract of purchase, give a lien upon the interests of both vendor and vendee. (487)

4. —— *Statute Construed.* Sec. 4029, of the Revised Statutes, has no application to improvements made pursuant to a contract with the owner of the land. (487)

5. MAXIMS—*False Demonstration,* does not vitiate, if the thing intended is otherwise sufficiently described. (485)

Error to Jefferson District Court. HON. H. S. CLASS, Judge.

MR. ROBERT R. ROSE for plaintiff in error.

MR. GEO. B. CAMPBELL for defendant in error.

KING, J., delivered the opinion of the court.

Judgment was rendered against the plaintiff in error, by which a mechanic's lien was established and ordered foreclosed, under the following circumstances: D. W. Coulter, being the owner of a certain five-acre tract of land in section 13, township 3 south, range 69 west, agreed to sell the same to F. J. Penna and D. A. McPherson in consideration of the payment of $2,000 to be made in installments, and in further consideration of the agreement on the part of the vendees to provide all material for and erect on said land one stone barn, and one milk house, to be commenced within eighteen days, and completed within one year from the date of said agreement. Three days after the foregoing agreement was entered into, Coulter conveyed the said premises to Miller, plaintiff in error, for a nominal consideration, subject to the contract of sale and purchase aforesaid. The agreement and the deed were recorded. Thereafter, defendant in error sold to Penna and McPherson building materials to be used, and which were used, in the erection of the buildings mentioned in the agreement. The improvements were erected with the full knowledge of Miller. A lien statement was filed in due time, naming Penna, McPherson and Miller as the owners or reputed owners of the land; thereafter Miller enforced the forfeiture clause in the agreement of sale and purchase, ejected Penna and McPherson from the premises, and took possession thereof.

Two principal questions are argued by plaintiff in error, which he insists are sufficient to reverse the judgment: (1) That the statement of lien does not contain a description of the property to be charged therewith "sufficient to identify the same;" (2) that the written contract of sale was, in legal effect, a mortgage, and being of record before the materials were furnished by the lien claimant, constitutes a lien prior and superior to that of the defendant in error.

1. The statute provides that the lien statement filed for record shall contain, *inter alia,* "a description of the property to be charged with the lien, sufficient to identify the same."

The parcel of land sought to be charged with the lien was described in the lien statement by metes and bounds, as follows: "Commencing at a point on the center line of section 13, township 3 south, range 69 west, 440 feet south of the intersection of said center, and the north line of said section *six*, south 440 feet, thence east 495 feet, thence north 440 feet, thence west 495 feet to the point of beginning, being five acres more or less, * * * all situate in Jefferson County, Colorado." The insertion of the number *six* was a clerical error. The description given in the agreement and the deed, and the correct description of the starting point was as given above, with the exception that in the deed the word "thence" took the place of the word "six" as found in the lien statement. It is obvious that there is no point at which the center line of section 13 intersects the north line, or any line, of section 6, so that the designated starting point, if the word *six* be given effect, cannot exist. For that reason it is contended that there is and can be no identification of the premises from the instrument itself. It is plain that the land attempted to be described is a part of section 13, as its initial point is on the north-and-south center line of said section, 440 feet south from the north line of some section. It is equally plain that such point could not be at the intersection of the said center line of section 13 with the north line of section 6, or any other section than 13.

A false description does not vitiate an instrument, or make it inoperative, provided the thing intended is otherwise sufficiently described. *Falsa demonstratio non nocet, cum de corpore constat.*—Broom's Legal Maxims, p. 470; *Murray v. Hobson,* 10 Colo. 66, 13 Pac. 921. Both reason and authority support us in holding that a false "call" so obvious as that found in this instance may and should be rejected. There is no pretense that plaintiff in error was misled or in any manner injured by the erroneous description. It does not appear that either he or Penna and McPherson were the owners of any other real estate in that vicinity to which the lien statement

could apply. The lien statement designated the owners or reputed owners of the property as Penna and McPherson, "who hold some contracts for the purchase of the same," as well as Miller, plaintiff in error. This statement has some weight in aiding the description, and, with other *indicia* of ownershp and location found in the statement, we think was sufficient to furnish identification to anyone willing to be advised rather than hoping to be deceived.

Plaintiff in error also contends that the description is wholly insufficient because it does not attempt to describe the buildings into which the material furnished was incorporated. It cannot be doubted that it is the intention of the lien act to give a primary lien on the structure for which materials are furnished or on which labor has been bestowed, and that such lien is only extended to cover so much of the lands on which the building, structure or improvement has been made as may be necessary for the convenient use and occupation of the building, in order to effectuate the primary lien, and for that reason the contention of counsel, that a statement which does not contain some description of the buildings is defective, is correct.—*Warren v. Quade,* 3 Wash. 750, 29 Pac. 827. But it is often, and, we think, generally, held that unless the statute requires the building, as distinguished from the land, to be described, or the building is to be removed after sale, a description of the land will include the buildings on it, and the lien will attach to both, although the buildings are not described.—27 *Cyc.* 163, and cases cited. A description of the buildings would very materially aid in the identification of the property intended to be subjected to the lien, and while it should have been included, we cannot say that the omission is fatal. Moreover, the lien statute (section 4043 R. S. 1908) says, "The provisions of this act shall receive a liberal construction in all cases." Keeping in mind this requirement, and in view of the equities disclosed by the evidence, we think the lien claimed should not fail because of the clerical error noted.

2. Under the written agreement of purchase and sale, the vendees were not only permitted, but required, to erect the very buildings for which the lien claimant furnished the materials. Under such conditions, it is settled law in this state that the interest of the vendor in the real estate, as well as the interest of the vendee, is subject to the lien of those furnishing material for the construction of the improvements under the contract of sale.—*Shapleigh v. Hull,* 21 Colo. 419, 41 Pac. 1108; *Colo. Iron Works v. Taylor,* 12 Colo. App. 451, 55 Pac. 942; *Pike v. Empfield,* 21 Colo. App, 161, 121 Pac. 1054. Therefore, it must be held that as between Coulter, the vendor, and the lien claimant, the lien would attach. It is conceded that by the terms of the deed from Coulter to Miller, the plaintiff in error merely took the place of Coulter, and became subject to the same liability, if any resulted, so far as the lien claimed is concerned. Such a contract of purchase and sale is frequently held to be a mortgage, and is generally so held where necessary to do equity and preserve substantial rights; but the circumstances of this case do not present a condition calling for such construction of the instrument or the application of that principle. The lien on the land is sustained upon the contractual relation between the vendor, the vendee, and the lien claimant, and not upon the provisions of section 5 of the lien act (section 4029 R. S. 1908). The last named section has no application to improvements made pursuant to contract, direct or indirect, with the owner of the land.—*Fisher v. McPhee & McGinnity Co.,* 24 Colo. App. 420, 135 Pac. 132; *Grimm v. Yates,* —— Colo. ——, 145 Pac. 696, decided December 7, 1914; *Stewart et al. v. Talbott et al.,* —— Colo. ——, 146 Pac. 771, decided January 4, 1915.

The questions presented by counsel for plaintiff in error are not free from difficulty. If the circumstances of the case called for strict construction of the act, or a different application of the rules, in order to do equity, his contention might prevail; but upon the showing made, we are satisfied that the judgment should be affirmed. *Affirmed.*

[No. 4107.]

PAULSEN V. ROURKE.

1. EVIDENCE—*Burden of Proof.* The principal asserting a revocation of the agent's authority has the burden of proof. (489)

And defending the action of a broker for commissions upon a sale of land, on the ground that he had himself already sold to another, has the burden to prove such sale. (489)

2. PRINCIPAL AND AGENT—*Instructions of Principal.* The agent may obey the verbal instructions of his principal, though a departure from the writing by which the agent was employed. (489)

3. ESTOPPEL—*By Conduct.* Defendant employed plaintiff to find a purchaser for certain lands, but refused to convey to the purchaser produced by plaintiff, on the ground that he himself had already sold the land. In the agent's action for commissions the principal will not be heard to assert another ground as justifying his refusal. (491, 492)

4. LAND BROKER—*Action for Commissions—Ability of Purchaser Produced.* It need not be shown that the purchaser offered by the broker had in actual cash the amount necessary to consummate the purchase. The equivalent of cash, e. g. collateral readily convertible may suffice. (491)

The evidence of the proposed purchaser's ability held sufficient to take the case to the jury. (491)

5. —— *Employment for a Time Certain,* precludes the principal from the employment of another broker during the time limited. If during such time the principal sells through another broker he is liable to the one first employed, if within the time limited he produces a purchaser willing and able to buy. (492)

6. EVIDENCE—*Measure of Proof Required.* Action by land-broker for commissions. Meagre evidence of the ability of the proposed purchaser held sufficient to go to the jury. (491)

Error to Prowers District Court. HON. A. WATSON MCHENDRIE, Judge.

MR. GRANBY HILLYER for plaintiff in error.

MR. C. C. GOODALE for defendant in error.

CUNNINGHAM, P. J., delivered the opinion of the court.

Plaintiff in error, a real estate agent, as plaintiff below, commenced his action in the District Court to recover from the defendant in error a commission, which plaintiff alleged was due him by virtue of a listing contract, or agreement, whereby plaintiff was to find a buyer for certain farming land belonging to the defendant. At the close of plaintiff's testi-

mony the trial court directerd a verdict for the defendant. The pleadings are in the usual form in such cases, and the essential facts will be stated as we proceed. There is no contention as to the amount due plaintiff, if there be anything due him. The defendant bases his defense principally upon three grounds, which we shall now proceed to consider.

1. Defendant contends that he had revoked the plaintiffs' authority to find a purchaser before the latter had produced one. This contention can be summarily disposed of under the rule that the burden of proving revocation rests upon him who alleges it—the defendant in this case, and, not having introduced any evidence whatever, defendant's contention of revocation cannot be allowed.

Defendant's revocation, so far as we can gather from his answer and the testimony given by defendant, is based upon the contention that, through another agent, he had sold the land before plaintiff had produced a purchaser. The plaintiff testified that this was the excuse which the defendant made for not carrying out his arrangement with him. But, it is clear, the mere fact that defendant so stated to plaintiff constitutes no proof from which we may consider that he had in fact sold the land. We shall later on further consider the question of revocation raised in this case.

2. Defendant insists in his brief that plaintiff had arranged with the purchaser which he produced to pay one-half of the purchase price in cash, whereas by the agreement which he, the defendant, had with plaintiff, the purchaser was to pay but $7,000 cash—a far less sum of money than one-half of the selling price. This defendant contends was not a performance of the contract. There are two sufficient answers to this contention: (a) Plaintiff testifies on the stand unequivocally that although $7,000 was named in a certain memorandum evidencing the agreement between plaintiff and defendant, yet the defendant had authorized and instructed the plaintiff to take all the cash he could get; (b) the defendant at the time plaintiff advised him that he had found a buyer

did not refuse to close the deal on the ground the terms were unsatisfactory; defendant's only excuse made for not carrying out the contract which he had made with the plaintiff being that he had already sold the land. *Bourke v. Van Keuren,* 20 Colo. 95, 36 Pac. 882.

Defendant further contends that there was no sufficient showing made by the plaintiff of the ability of the customer which plaintiff produced to make the purchase on the terms agreed upon. The proposed purchaser produced by the plaintiff testified on this point as follows:

"Q. Now at the time that you wrote that letter (meaning a letter which he wrote to the plaintiff, the pertinent portion of which reads as follows: 'Wayland, Mo., August 29, 1912. Mr. Claus Paulsen, Lamar, Colorado. Dear Sir: The proposition in regard to the Rourke land will be accepted as we agreed upon, one-half to be paid down and balance to be as you stated), you say you were willing to buy the property on the terms you have stated, what was your ability to buy the property? A. I had collateral, I suppose I had the money to pay for it.

"Q. You had the money at that time to make this deal? A. Equivalent there, yes sir.

"Q. Cash payment? A. Yes, sir."

While this testimony is in some respects similar to that given in *Fox v. Denargo Land Co.,* 37 Colo. 203, 86 Pac. 344, upon which defendant relies, we have examined the record in that case and find the testimony before the court in the Fox case was substantially different on the point here under consideration from the testimony quoted above. The proposed buyer in the Fox case made no attempt to show that he was able to purchase the land. The purchase of the land in that case required the payment of a very large sum of money at an early date, but the contract which the purchaser testified that he was willing to carry out required the payment of very little cash except as he disposed of portions of the land, which was a large tract platted into town lots. In other words,

Porter, the proposed purchaser in the Fox case, agreed to do nothing except to accept the privilege of buying, if he should see fit to do so. The defendant in the case before us made no attempt to rebut the testimony offered by the plaintiff as to the ability of Schmid, the proposed buyer, to take the land upon the conditions specified. Indeed, the witness was not even cross-examined upon this point. It is not necessary, in order to show the ability of a proposed purchaser to make a purchase, to prove that he had the amount necessary to close the deal in actual cash at the moment he agrees to purchase. If it is shown that the purchaser has sufficient collateral, or the equivalent to cash which he could readily convert into cash, that is sufficient. Plaintiff offered sufficient evidence on this point to take the case to the jury.

4. In view of another trial, we deem it our duty to consider certain other contentions which have been urged in the briefs. The evidence tends to establish that the defendant gave plaintiff ninety days in which to produce a purchaser. Plaintiff produced a purchaser within the prescribed time, indeed, within a very few days after this agreement had been made. Defendant insists that notwithstanding he gave the plaintiff a definite length of time within which to produce a purchaser, this does not give plaintiff exclusive authority to sell the land; that under such circumstances, by implication, the defendant retained the right to make a sale at any time, and that such sale so made by the defendant constitutes a revocation of plaintiff's agency. The trial court appears to have taken this view, and from the remarks made in passing upon plaintiff's motion to dismiss the case it is clear that the trial court granted the same solely upon this theory. In so doing the trial court committed manifest error, for two reasons: First, because, as we have already pointed out, there was no proof that the defendant had sold the land at all; second, by the allegations of his verified answer the defendant did not sell the land, that is, did not find a buyer for it, for therein he alleges, "that on the 2nd day of September, 1912,

the said A. A. Gorham (another agent with whom defendant alleges he had listed the land) procured a purchaser for the property satisfactory to defendant and that defendant sold said property to * * * the said purchaser procured by the said A. A. Gorham."

Some authorities distinguish between *exclusive agency* and *exclusive authority,* and hold that while a specific time given a real estate agent in which to procure a purchaser may constitute an exclusive agency which prevents the owner from selling the land within the prescribed time through another agent, it does not prevent the owner from himself finding a buyer, and where the owner himself does find a buyer before the agent has produced one the latter is remediless. It is not necessary for us to express an opinion upon this attempted distinction, since, as we have pointed out, the owner of the property in the instant case makes no attempt to show that he had himself found a buyer for the property. His answer shows a contrary state of facts, and the plaintiff on the stand testified that when he advised the defendant that he had found a buyer for this land the defendant then informed plaintiff that he had sold the same, *through the efforts of another agent.* While there may be authorities to the contrary, we are of opinion that where the principal gives his agent a definite time in which to find a purchaser for his property the principal may not during such time make a sale through another agent without becoming liable to the first agent, if the first agent produces a buyer within the time fixed. Many well reasoned cases hold that the principal may not, without becoming liable to the agent for his commission, where the latter produces a buyer, within the time, ready, able and willing to purchase, sell the land himself. In other words, these authorities hold that an agency for a definite length of time confers exclusive *authority* as well as exclusive *agency,* but for the reason already stated it is not necessary for us to determine more than that it constitutes an exclusive agency. See *Blumenthal & Co. v. R. E. Bridges,* 91 Ark. 212, 120 S. W. 974, 24 L. R.

A. (N. S.) 279; *Hardwick v. Marsh,* 96 Ark. 23, 130 S. W. 524; *Levy v. Rothe,* 17 Misc. Rep. 402, 39 N. Y. S. 1057; *Glover v. Henderson,* 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; *Green v. Cole.* 127 Mo. 587, 30 S. W. 135; *Lane v. Albright,* 49 Ind. 275; *Cloe v. Rogers,* 31 Okla. 256, 121 Pac. 201, 38 L. R. A. (N. S.) 366; Clark & Skyles on Agency, vol. 2, §§ 159, 160.

An especial reason exists in this case why, upon the record now before us, it should be ruled that plaintiff's authority constituted an exclusive agency—we refer now to the testimony of the plaintiff, who said that he made special inquiry of the defendant, at the time the agency agreement was made, whether the land was listed with another agent, and was advised by defendant that it was not so listed; that defendant "said I was the only one had it. I asked him, I wanted to be sure I had this land, if I was the only one."

The defendant at the close of plaintiff's testimony moved that the case be dismissed. Upon this motion the trial court appears to have directed a verdict, but, as neither party has made a point of the court having instructed a verdict where a dismissal was asked for, further comment is unnecessary.

We believe it not out of place for us to here call attention to the fact that much unnecessary litigation has come to this court by reason of trial courts having improvidently directed verdicts and granted motions for non-suit. Great caution should be exercised by trial judges when motions of this character are made, and they should never be granted in doubtful cases.

For the reasons given above the judgment is reversed.

Judgment Reversed.

[No. 4120.]

JEWEL TEA COMPANY v. WATKINS.

1. CONTRACTS—*Construction.* Every contract is to be construed as a whole, effect being given to every phrase where this is possible, and works no injustice to either party. (496)

Where the words are susceptible of two constructions, one working injustice should be rejected in favor of one producing the opposite result. (496)

Where the intention is manifest inapt expressions will be disregarded, and technical rules of construction will not defeat such intention. (497)

The recitals of a contract are to be considered, as these sometimes have great influence in the interpretation. (498)

General words following particular or specific terms are restricted in meaning to things of the same nature with those first mentioned. (498)

2. —— *Construed.* A contract by a merchant employing a salesman provided that the salesman should not, within twelve months after quitting the merchant's service, "solicit or take orders or deliver orders for teas, coffees, etc., *or other merchandise,*" to any of the customers of the merchant, nor sell nor offer for sale, "teas, coffees, etc., or *other merchandise,*" during the life of the contract, nor for twelve months thereafter, in five certain cities and towns mentioned. *Held,* that the phrase "or other merchandise" was to be restricted to merchandise of the same character as that previously mentioned, and had not the effect to invalidate the contract; that both as to the time and territory the limitation was eminently reasonable and the contract enforcible. (500)

Error to Denver District Court. HON. JOHN H. DENISON, Judge.

MR. J. FOSTER SYMES and MR. IVOR O. WINGREN for plaintiff in error.

CUNNINGHAM, P. J., rendered the opinoin of the court.

Plaintiff and defendant entered into a contract whereby the latter became an employe of the former as a salesman. The plaintiff corporation was engaged in selling teas, coffees, and other culinary articles, from wagons driven by its employes over well established trade routes in this state. The sole question presented for our consideration is as to the validity of a certain paragraph in the written contract entered into by the parties, which reads as follows:

"Party of the second part (defendant in error and defendant below) further agrees that he will not at any time

while in the employ of the party of the first part, nor within a period of twelve months after leaving the services of the party of the first part, for any cause, for himself or any other person, persons or company, solicit or take orders from, or deliver orders for teas, coffees, baking powder, extracts, spices, cocoa, *or other merchandise* to any of the customers of the party of the first part, and especially agrees not to interfere with the trade or business of the party of the first part as now transacted or carried on with its customers in the territory in which the party of the second part has been working.

"Party of the second part further agrees that he will not directly or indirectly, through himself or others, take away or attempt to divert any of the custom, business or patronage of the party of the first part with its customers in said territory within twelve months after leaving.

"Party of the second part further agrees, as a condition precedent, that he will not engage for himself or any other person, persons or company in the tea and coffee business, nor will he offer for sale any teas, coffees, baking powder, extracts, spices, cocoa *or other merchandise* during the life of this contract, nor during a period of twelve months after leaving the employ of the first party, for any cause, whether before or after the termination of this contract, in the cities of Denver, Longmont, Lafayette, Louisville or Erie."

We have italicized what we understand to be the phrase which has occasioned the dispute in this case. The aforesaid contract was dated September 15th, 1913, and provided that it might be terminated by either party on giving the other two weeks' notice. The contract was terminated on the 10th day of January, 1914, and thereupon, according to the allegations of plaintiff's bill, the defendant engaged in the business of selling and delivering orders for goods of the same general character as those referred to in the contract and to the customers of plaintiff on its established trade routes. The trial court sustained a general demurrer to plaintiff's bill, for the reason that in the opinion of the court "the restriction

against soliciting for tea, etc., 'or other merchandise,' and in forbidding defendant to offer for sale teas, etc., 'or other merchandise,' is unreasonable, because going beyond what is necessary for the protection of the plaintiff, and the contract being unreasonable, in that respect, cannot be enforced in equity."

At the time of sustaining defendant's demurrer to the bill the trial judge further stated that "if the contract contained the words 'of a similar nature,' as stated in the complaint, it would not be open to this objection," referring to the objections set forth in that portion of the court's remarks which we have quoted. Thus it will be seen there is left for our determination but a single question, viz.: Is the contract in question, by reason of the clause which we have already quoted from it, vicious for the reason stated by the trial court? This question we think must be answered in the negative.

"A contract must be construed as a whole, effect being given to all its parts and provisions when that can be done without working an injustice to either party, and when doubt exists and the contract is susceptible of two constructions, the one working an injustice and the other consistent with the rights of both parties, the one which upholds the rights of the parties should be adopted." *C., B. & Q. R. Co. v. Provolt,* 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587; *Chicago, R. I. & P. Ry. Co. v. Denver & Rio Grande R. Co.,* 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277; Parsons on Contracts (9th ed.) vol. 2, p 661 *et seq.;* Page on Contracts (1905) §§ 1120, 1121; Beach on Contracts (1896) vol. 1, §§ 708, 709, 717.

"The primary rules for the construction of contracts are that the court may put himself in the place of the contracting parties, and then in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, consider what they intended by the terms of their agreement, and that when the intention is manifest it will control

in the interpretation of the instrument, regardless of inapt expressions and technical rules of construction."—*Tillitt v. Man,* 104 Fed. 421, 43 C. C. A. 67; *Messenger v. German American Ins. Co.,* 47 Colo. 448, 107 Pac. 643; Parsons on Contracts (9th Ed.) vol. 2, p. 655; Page on Contracts, § 1123; Beach on Contracts, §§ 712, 719.

[4] "The circumstances surrounding the making of the contract and affecting the subject to which it relates form a sort of context that may properly be resorted to * * * in determining the meaning of the words and provisions of the contract."—*McKeesport M. Co. v. Ben Frankin Ins. Co.,* 173 Pa. St. 53, 34 Atl. 16, quoted with approval in *Messenger v. German Am. Ins. Co., supra; Farrell v. Garfield M. M. & S. Co.,* 49 Colo. 159, 111 Pac. 839; *Fearnley v. Fearnley,* 44 Colo. 417, 98 Pac. 819; Page on Contracts, § 1106; Beach on Contracts, § 711.

Considering the contract before us in its entirety, it is quite apparent that the object and purpose of the contract was to restrain the defendant from quitting the employ of the plaintiff, and thereafter, on his own behalf, or as the salesman for another, to avail himself of the advantage of acquaintances he had made with plaintiff's customers while in the employ of plaintiff, and thus divert from plaintiff trade which it had built up. The recitals in the contract make its object and purpose perfectly apparent. In part they read as follows:

"Whereas, said party of the second part desires to enter the employ of the party of the first part, and by virtue of such employment will be enabled to discover and acquire full knowledge of the methods used by the party of the first part in conducting its business in the buying, selling, testing, keeping and distributing teas, * * * and other merchandise * * * and will necessarily become acquainted with the customers and residences along and in such territory (commonly known as trade or delivery routes) as may be entrusted to him from time to time.

"Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained the parties hereto covenant and agree as follows:" etc.

It is proper in the interterpretation of deeds or written agreements to look to the recitals thereof. These sometimes have great influence in the interpretation of the other parts of the instrument.—Broom's Legal Maxims (1900), p. 428; Parsons on Contracts (9th Ed.), vol. 2, p. 659; Beach on Contracts, sec. 711.

Another wholesome rule of construction requires courts to construe the words of parties so as to effectuate their deeds and contracts, and not to destroy them, for contracts should be supported rather than defeated.—Parsons on Contracts, 659; Page on Contracts, secs. 1120 and 1121; Beach on Contracts, secs. 708, 709 and 717; Broom's Legal Maxims (1900), p. 398.

"Where there is room for it, the court will give a rational and equitable interpretation, which, though neither necessary nor obvious, has the advantage of being just and legal, and supposes a lawful contract which the parties may fairly be regarded as having made."—Parsons on Contracts, p. 661; *St. Louis & Denver Land & Mining Co. v. Tierney,* 5 Colo. 582; *Wyatt v. Larimer & Weld Irrigation Company,* 18 Colo. 298, 33 Pac. 144, 36 Am. St. 280.

Thus far our discission of the contract has proceeded upon the theory that the same was rendered ambiguous or of doubtful validity by reason of the phrase, "or other merchandise," which we have italicized in our quotation from the contract. There is abundant authority supporting a contrary view.

"The court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply. Thus general words following particular or specific terms are restricted in meaning to those things or matters which are of the same kind as those first mentioned."—9 Cyc. 584-585.

To give to the phrase "and other merchandise" the broad meaning claimed for it by the defendant would be to invest it with power by which it might defeat what seems to have been the main purpose of the contract. This rule of construction will not ordinarily be applied where by so doing the contract is destroyed and the purpose and object of the parties to it thwarted.

"It is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right and the other is wrongful and against law, the intendment that standeth with law shall be taken."—Coke on Littleton, 42, 183; *Archibald v. Thomas,* 3 Cowen 284; *Riley's Admrs. v. Vanhouten,* 4 How. (Miss.) 428; *Many v. Beekman Iron Co.,* 9 Paige 188.

"Where there are recitals of particular claims or considerations, followed by general words of release, the general words shall be restrained by the particular recital. Thus, if a man should receive ten pounds and give a receipt for this sum, and thereby acquit and release the person of all *actions, debts, duties, and demands,* nothing would be released but the ten pounds, because the last words must be limited by those foregoing."—2 Roll. Abr. 409; *Paylor v. Homersham,* 4 M. & S. 426; *Lyman v. Clark,* 9 Mass. 234; *Rich v. Lord,* 18 Pick. 322, at 325; *Jackson v. Stackhouse,* 1 Cowen 122, 13 Am. Dec. 514; *Bellamy v. Bellamy's Admrs.,* 6 Fla. at p. 107.

Where, in a statute, general words follow particular ones, the rule is to construe them as applicable to subjects *ejusdem generis,* and we know of no reason why the rule as applied to statutes may not be with equal propriety applied to the interpretation of contracts.

"According to Lord Bacon, 'all words, whether they be in deeds or statutes, if they be general and not express and precise, shall be restrained into the fitness of the matter and the person.' "—Beach on Contracts, note to page 862.

"As was well stated by Black, C. J., in *Sharpless v. Philadelphia,* 21 Pa. St. 161, 'it is a universal rule of construction, founded in the clearest reason, that *general* words in any instrument *are strengthened by exceptions and weakened by enumeration.*'"—*Wisconsin Central R. R. Co. v. Taylor County,* 52 Wis. at p. 90, 8 N. W. 833.

No contention appears to have arisen or been made as to the legality of the contract here in question, aside from that which we have already discussed, and the terms both as to time and territory embraced seem eminently reasonable.

For authority on the question of the enforcibility of contracts of the character here under consideration see *Barrows v. McMurtry Mfg. Co.,* 54 Colo. 432, 131 Pac. 430, and *Freudenthal v. Espey,* 45 Colo. 488, 102 Pac. 280, 26 L. R. A. (N. S.) 961.

Judgment reversed and the case remanded for further proceedings in conformity with the views herein expressed.

Reversed and Remanded.

[No. 4183.]

THE PEOPLE EX REL. V. CANNON, COUNTY TREASURER.

APPEAL AND ERROR—*Abandonment—Discontinuance.* Where nothing remains in controversy between the parties the writ of error will be dismissed.

Error to Mesa District Court. HON. THOMAS J. BLACK, Judge.

Motion to Dismiss.

MESSRS. WILLIAM WEISER, GEORGE BULLOCK, L. L. MORRISON for plaintiff in error.

MESSRS. JOHN H. FRY, WILLIAM F. DENIOUS, JOHN F. HALDERMAN for defendant in error.

Per Curiam.

It appears from the motion to dismiss the writ of error herein and the affidavit filed therewith and from the oral argument and typewritten brief of the defendant in error, and from the record itself, that the plaintiff in error, although a stay of execution for thirty days was granted in the lower court, has made no application for a supersedeas, or for a further stay of execution, and that the said thirty days has long since expired; it appears further that the defendant, after the thirty days' stay of execution expired, paid the indebtedness sought to be enjoined and prevented, thus leaving no live issue for adjudication. For these reasons the motion to dismiss the writ of error is hereby sustained and the writ dismissed.

[No. 3978.]

CLARK V. ALDENHOVEN.

1. NEW TRIAL—*Weight of Evidence.* The weight of evidence does not depend upon its volume, or the number of witnesses. Jurors exercise a large discretion in judging of the credibility of witnesses, and separating the true from the false. Their conclusions will not be disturbed, unless the verdict manifests bias, prejudice, or a wanton disregard of their duties and obligations by the jurors. (505)

As a general rule, when the evidence is conflicting the trial court will refuse a new trial even though there may be a slight preponderance against the verdict. Its action will not be reviewed unless a manifest abuse of discretion appears. (505)

In actions for tort a verdict will not so readily be vacated as against the weight of evidence, as in actions *ex contractu.* A verdict will not be set aside either in the trial court or the court of review unless it is so manifestly against the weight of evidence as to warrant a presumption that the jury misunderstood the evidence, or misconstrued its effect, or were influenced by improper motives. (506)

The court of review will not interfere where there is evidence to support the verdict. (505)

The trial judge having exercised extreme caution to protect the rights of the plaintiff in error, both in the admission and exclusion of evidence, and in the instructions the court of review declined to reverse his action in denying new trial. (509-510)

2. —— *Excessive or Inadequate Damages, When a New Trial Will Be Granted For,* rests in the discretion of the trial court, in cases where there is no legal measure of damages, or where the correctness of the result is not determinable by any definite and precise rule. (509)

3. EXEMPLARY DAMAGES—*Construction of Verdict.* Where the verdict is a general one, not showing that anything is allowed by way of punishment, and the jury were expressly charged that "the law does not require you to give exemplary damages," held there was no error in this respect. (511)

Error to Denver District Court. HON. JAMES H. TELLER, Judge.

MR. GEORGE C. MANLY, MR. CLAY B. WHITFORD, MR. HENRY E. MAY for plaintiff in error.

MR. GEORGE K. ANDRUS for defendant in error.

CUNNINGHAM, Presiding Judge.

The facts necessary to an understanding of the issues in this case are about as follows: Mrs. Aldenhoven, defendant in error and plaintiff below, staked her cows on certain vacant lots belonging to Clark, plaintiff in error and defendant below. This led to an altercation in which it is admitted that Clark pulled the picket pins and drove Mrs. Aldenhoven's cows off the premises. During the altercation the plaintiff was precipitated into a creek nearby. Plaintiff alleges that she fell into the creek as the result of a blow from an iron pipe which defendant had snatched from her hands. Defendant denies that he struck plaintiff at all, but admits that he took the gas pipe away from her, to prevent her from striking him, and he insists that in the melee the cow became frightened and the rope with which she was tied caught Mrs. Aldenhoven, and in this manner, through no fault of his whatever, she was toppled over into the creek. Civil action was begun by plaintiff for damages, resulting in a verdict in her favor for $2,500; from a judgment thereon the case is here on writ of error for review.

1. On the trial there was but one witness, aside from plaintiff and defendant, who claimed to have seen the difficulty; that witness was a young man, some nineteen years of age, who for four years had been, and at the time of the difficulty was, in the employ of the defendant Clark. His

testimony in all particulars corroborated the testimony given by Clark in his own behalf, and was to the effect that Clark snatched the pipe from plaintiff's hands, but did not strike her with it, and that she was precipitated into the creek in the manner described by Clark. There was some evidence offered on rebuttal tending to show that the young man who thus corroborated Clark's testimony was not in a position where he could have seen the altercation. The jury must have believed plaintiff's testimony to the effect that she was struck by Clark and knocked into the creek, and upon the evidence substantially as given, and which was supported (to the extent presently to be stated) by plaintiff's physician who examined her shortly after the quarrel, we can not say that such finding is not warranted.

2. The most serious question presented for our determination is that raised by the contention of Clark that the verdict is excessive. Whether this be true or not depends largely upon the extent of the plaintiff's injuries. Upon this point the evidence was conflicting. Plaintiff testified that she was landed in the creek by the force of the blow which Clark dealt her with the iron pipe, and that as a result thereof, for a time she was unconscious, and with great difficulty succeeded in reaching her home nearby; that she was nervous and chilled on the night following (the accident occurred in the evening), and that her pain was so severe as to cause her to cry; that this pain continued for three or four weeks following the accident; that she was confined to her bed for a week; that as a result of the medicine which she was forced to take for her nervous condition the hearing of her right ear had become seriously impaired, and that she had not, at the time of the trial, which occurred in December, been well, the injury having occurred in June. There was other testimony similar to this given by plaintiff's two daughters and her husband. A doctor was called on the night of the injury, and he testified that he found a red spot or bruise on plaintiff's left side at the point where she claims she had

been struck; the doctor also says he found her in a highly nervous condition, talking incoherently; he also testified that although plaintiff had not been a woman of robust health, her condition had been much worse since the injury. Plaintiff herself testified that shortly before the injury she weighed 130 pounds, but that at the time of her trial her weight was but 103 pounds. Defendant apparently did not ask to have a physical examination of plaintiff made by physicians, and the only testimony offered to contradict plaintiff's statement, and the statement of her witnesses, with reference to her injury, was that of certain witnesses who testified that they had seen her up and about shortly after the injury, and that they did not observe any marked change in her condition. Several of these witnesses were employes of the defendant, and one was a policeman who had had some difficulty with the plaintiff, or, at least, had been obliged frequently to warn her against permitting her cows to run at large and thus annoy her neighbors.

In approaching the consideration of the contention made by plaintiff in error that the verdict is excessive it must be borne in mind that the plaintiff's action in this case sounds in tort, and that:

"A verdict against the weight of evidence will be more readily set aside as against the weight of evidence in actions *ex contractu,* where there can be more precise rules for weighing the evidence, than in actions *ex delicto.*" 14 Enc. Pl. & Pr., p. 774.

It may be conceded that the verdict would appear, upon a reading of the record, to be a generous one, but,

"Whether a new trial should be granted for excessive or inadequate damages rests within the discretion of the trial court in cases where there is no legal measure of damages, or where the correctness of the decision of the court can not be determined by the application of definite and precise rules." —14 Enc. Pl. & Pr., p. 755.

"It is a rule of both trial and reviewing courts not to set aside a verdict unless it is so manifestly wrong or so clearly against the weight of evidence as to warrant the presumption that the jury misunderstood the evidence or misconceived its force and effect, or was influenced by malice, passion, prejudice or other improper motives."—14 Enc. Pl. & Pr., p. 777,

And,

"As a general rule, where the evidence is conflicting, the trial court will refuse a new trial, even though it may appear that there is a slight preponderance of evidence against the verdict. In such cases it is a matter of discretion with the trial court to refuse a new trial, and its order will not be disturbed unless it appears clearly that there was an abuse of discretion."—Id. 780.

In *Green, Admx. v. Taney*, 7 Colo. 281, 3 Pac. 423, Mr. Justice Helm, speaking for the court, says,

"The weight of evidence does not wholly consist in its volume, nor in the number of individuals sworn. That is a most beneficent evidential rule which gives juries a large discretion in judging of the credibility of witnesses; which makes it peculiarly their province to discrimnate between those who testify before them, and imposes upon them the duty of sifting the evidence, accepting the true and rejecting the false."

And in *Leitendorfer v. King, Admx.*, 7 Colo. 436, 442, 75 Pac. 816, the same learned judge uses this language:

"The sum named in the verdict is large; a court, or perhaps another jury, might have awarded less; but we are not prepared to say that it is so excessive as to justify interference therewith by us. A large discretionary power is lodged with the jury in cases like this."

Courts of review should be more reluctant in interfering with verdicts on the ground that the same are excessive than trial courts.—14 Enc. Pl. & Pr., p. 780:

In *Hallack v. Stockdale*, 14 Colo. 198, 23 Pac. 340, the following language is used:

"It is a well settled rule of this court, as well as of all courts of appellate jurisdiction, and a cardinal principle, that the jury is the final and only tribunal to determine questions of fact, and that where facts are so found, their finding will not be disturbed by the appellate court, unless misconstrued by the court, or their verdict is so palpably incorrect as to show bias, prejudice, or a wanton disregard of the duties and obligations of jurors; and this rule is well established in, and sustained by, reason."

Following this language the reasons for the rule as announced are well presented, and at p. 201 of the same opinion the court uses this language, especially applicable to the case here under consideration:

"Another cogent reason for the strict adherence of appellate courts to the rule above laid down is the fact that the trial judge, having the same opportunities for observation as the jury, can determine whether the jury are honestly and conscientiously performing their duty; and, if he is of the opinion that they are not, and that the verdict was the result of bias and prejudice, and made in disregard of duty, he can at once set it aside, and order a new trial. Where, as in this case, the questions are purely of fact, and the jury being the only tribunal for their determination, appellate courts will not interfere, *where there is evidence to support the verdict.*" (Italics are ours.) See *Chapin v. Goodell,* 2 Colo. 608; *Barker v. Hawley,* 4 Colo. 316; *Coon v. Duckett,* 13 Colo. 14, 21 Pac. 905; *Johnson v. Jones,* 16 Colo. 138, 26 Pac. 584; *Conrey v. Nichols,* 35 Colo. 473, 84 Pac. 470; *Millard v. Loser,* 52 Colo. 206, 121 Pac. 156; *Haldeman v. Colorado City,* 52 Colo. 238, 120 Pac. 1042; *Beggs v. Trump,* 52 Colo. 242, 121 Pac. 167; *Hafelfinger v. Perry,* 52 Colo. 447, 121 Pac. 1021; *Zimmerman v. Denver Tram. Co.,* 18 Colo. App. 480, 72 Pac. 607: Standard Enc. of Proc., vol. 2, pp. 434, 438, 442.

The Standard Encyclopedia, at p. 438, thus announces the rule which should govern appellate courts:

"A reviewing court is very reluctant to set aside a verdict on questions of evidence, and, generally, if there is any evidence at all to uphold the verdict, the court will deem it conclusive."

In support of this rule as announced in the text, which was prepared by Prof. William L. Burdick, author of "New Trials and Appeals," a long array of cases from thirteen different states are cited. The case of *Union D. & R. Co. v. Smith,* 16 Colo. 361, 27 Pac. 329, is a very interesting and important one, in view of the number of trials had therein, and the standing of the attorneys who represented the opposing parties. The value of the opinion is enhanced by the fact that it was written by the Supreme Court Commission (as was also *Hallack v. Stockdale, supra*), then composed of three able judges, and concurred in by the Supreme Court, which at that time was composed of Justices Helm, Elliott and Hayt. The Supreme Court appended to the commissioners' opinion an approving paragraph, from which we shall presently quote a sentence. The Supreme Court Commission, at p. 371, used the following language, citing numerous cases from various states in support thereof:

"Whatever may be the personal judgment of this tribunal as to the extent of the injury (the defendant brought his action for false arrest, which had been followed by his incarceration for only a few hours, and the jury had assessed his damages at $3,000) these successive verdicts ought to control the determination. * * * It is a case peculiarly within the province of a jury. Their right to assess the damages within any apparently reasonable limit ought not to be interfered with. An examination of all the cases upon both sides of the question clearly demonstrates that there is no uniform rule by which the amount of damages may be measured. There is the widest diversity of opinion among the courts as to the judgments which shall be allowed to stand. The range is wider, probably in such cases, than in any other."

Supplementing this view of the Commission, the Supreme Court used the following language:

"Some deference should also be paid to the action of the trial judge, who hears the testimony of the living witnesses. The weight of his opinion supporting that of the jury is an additional reason for not interfering upon appeal. It has been said that in such cases the wrong must be very gross and the damages enormous for the court of review to interpose upon the ground of an excessive award."

In *McDonald v. U. P. Ry. Co.*, C. C. 42 Fed. 579, a case arising in this jurisdiction, Mr. Justice Caldwell, speaking for the court, said:

"It is my observation and experience that a jury of intelligent, fair-minded men, familiar with the practical affairs of life—and the panel that tried this case, I think, may fairly be said to come up to this standard—are better judges of such a question of fact than the judge on the bench. But whether better judges or not, it is their exclusive province to determine the question; and for a judge to substitute the damages he would assess, acting himself as a jury, in the place of damages the jury have assessed, for no other reason than that he thinks he is a better judge of the fact than the jury, is an invasion of the province of the jury, and a violation of the constitutional right of a suitor to have his cause tried by a jury, and the questions of fact in it determined by a jury. * * * It boots nothing that, if the cause had been tried before me, I would have found a somewhat less sum."

It appears from the opinion of Judge Caldwell that the McDonald case had been previously tried before Judge Hallett, in the United States District Court, and that Judge Hallett had set aside a verdict for $2,500 on the ground that the same was excessive, and it further appears that in the Circuit Court the jury had returned a verdict in the same case for $7,500, and it was the latter verdict which Judge

Caldwell refused to set aside, using the language above quoted, and also the following:

"If the proof was the same at the two trials, it only shows the widely different conclusions that men of equal intelligence and equal opportunities will draw from the same state of facts."

Judge Caldwell is here referring to the fact that Judge Hallett had set aside a much smaller verdict. Continuing, Judge Caldwell says:

"I should feel very much like deferring to my learned brother Hallett on a question of law, but when we go outside of the law and put ourselves in the place of a jury to pass upon the facts, in this kind of a case, (the McDonald, like the case here under consideration, was for personal injuries) I think a good, intelligent jury knows better how to do that than either or both of us. And if this case, on the evidence I heard at the last trial, had been submitted to Judge Hallett and myself, sitting as a jury, and he had thought $2,500 an excessive verdict, there would have been a hung jury."

In *Monteith v. U. P. Ry. Co.*, 13 Colo. App. 425, 58 Pac. 338, the late Judge Wilson, who wrote the opinion, quotes with approval the following from Judge Fields' opinion in *Oullahan v. Starbuck*, 21 Calif. 415:

"It is not enough, however, to authorize any interference with the action of the court below, either in granting or refusing a new trial for alleged insufficiency of the evidence, that the appellate court, judging from the evidence as it is reduced to writing, would have come to a different conclusion. The court before which the witnesses were examined is usually better qualified to determine the propriety of granting or refusing a new trial on this ground than any appellate court, and its action in this respect will not be disturbed except for the most cogent reasons."

In this connection, it is proper to say that the learned trial judge who presided in the instant case exercised the utmost

caution, both in his rulings on the admission of testimony and in the granting and refusing of instructions, to protect the rights of the defendant; hence, under the authorities cited above, we do not feel at liberty to substitute our judgment for his, as well as for the judgment of the jury.

3. It is urged in this court on behalf of plaintiff in error that he is a poor man, and this verdict will mean his financial ruin. It is not necessary that we should determine whether this is, ordinarily, a consideration that should affect the judgment of a court of review, for the reason that we find no evidence whatever in the record to support this statement. On the contrary, there is evidence that defendant is a man possessed of something like seventeen acres of land adjacent to the city of Denver, for which, five years prior to this trial, he paid $5,000, and there is evidence indicating that he owned and operated a brick yard at the time of the injury which gave employment to a considerable number of working men.

4. Complaint is made that the court, by its instructions, permitted the jury to consider the question of exemplary damages. It is impossible to state, since the verdict was general, whether or not exemplary damages were allowed. No request appears to have been made on the trial by either party that the jury be required to indicate by its verdict whether or not they found the case one warranting exemplary damages, or whether they included exemplary damages in their verdict. We believe the case is one where, under the law, the question of exemplary damages might, with propriety, be submitted to the jury. But, in this connection we are constrained to say that the question of exemplary damages is a perplexing one to appellate courts, as well as to *nisi prius* courts, and its submission to a jury not infrequently leads to the reversal of judgments that, but for the injection of this question, might have been sustained. The jurors, however, were cautioned by the trial court that they should be very cautious in the application of the rule allowing exemplary damages, and were fur-

ther advised that: "The law does not require you to give exemplary damages in the case." We discover no error in the submission of the question of exemplary damages in this case.

The judgment of the trial court is affirmed.

[No. 3997.]

STATE SAVINGS & TRUST CO. V. MATZ.

1. CONVEYANCES—*Construction—Reference to Plat Not Recorded.* An incorporated town company, by deed dated July 14, 1894, conveyed to a trustee named, among other properties, "Block No. 15, according to the plat and subdivision of, etc.," "made by the Ordway Town & Land Company and of record in the office" of the recorder, etc. In ejectment plaintiff deraigned title under this conveyance. In fact, the plat was not recorded until October, 1894, but it was prepared, completed and approved by the directors of the town company on the day previous to the execution of the deed. *Held,* that the deed was effective, notwithstanding the false recital as to the record of the plat. (515, 516)

The certificate attached to the plat, so recorded, contained an express confirmation of "deeds heretofore made," etc., but the court refer to this only in considering the earlier plat mentioned in the next point.

2. —— *Confirmation of Prior Deeds in the Certificate to Plat of a Townsite.* Ejectment for part of the west two-thirds of block 15, in the town of Ordway. Plaintiff claimed under a conveyance describing the block by its number merely, "according to the plat and subdivision * * * made by the Ordway Town and Land Company." The only plat of record showed the east line of block 15 to be coincident with the west line of block 16. Defendant claiming that in fact the premises in controversy were a public street, produced an old plat inscribed "Plat of the Town of Ordway," made in 1890, showing a street 80 feet wide through block 15. This plat had never been recorded and there were thereon no words of dedication. It had never been promulgated by the town company, nor referred to in any conveyance by that company. A plat authenticated by the officials of the company, and recorded at a later date, showed block 15 entire, and not intersected by any street, and a certificate of authentication thereon declared that it was made "in strict accord with deeds heretofore made," and "confirms said deeds and description." *Held,* a clear repudiation of the elder plat. (515)

3. —— *Description—Of Block in Town-site,* by its number merely, and the name of the town, not expressly referring to the recorded plat, conveys the premises described by that number, as found in the plat; it is not required that there should be any express reference to the plat. (516, 517)

4. EVIDENCE—*Admission in Pleading.* One is not to be heard to object to a description of the premises in controversy by reference to a particular plat, when in his own pleadings he refers, as a basis of recovery, to a plat which the record shows is identical with that to which objection is made. (518)

5. —— *Parol Admissible,* even in ejectment, to identify the premises intended by the words of description used in a conveyance, e. g. evidence that the description in a conveyance of a block in a town-site was such as was commonly used in conveyances of premises within the same town-site. (519, 520)

But evidence to show that a different tract from the described was intended is not admissible. (519)

6. PLEADINGS—*Construed—Action at Law or in Equity.* Plaintiff's complaint demanded possession of certain lands, and throughout the trial he insisted that the conveyances which he produced conveyed the premises demanded. *Held,* that the action was an action at law. (522)

7. PARTIES—*Necessary Defendants.* Ejectment for the west two-thirds of a certain block. The existence of a street within the limits of the east one-third does not make it necessary to bring in the town as a party. (523)

Error to Crowley District Court. HON. J. E. RIZER, Judge.

MR. FRED A. SABIN for plaintiff in error.

MESSRS. HARTMAN, BALLREICH & O'DONNELL for defendant in error.

HURLBUT, J., rendered the opinion of the court.

August 13, 1908, defendant in error, as plaintiff, filed the complaint in this action in the District Court of Otero county. The purpose of the action, as shown by the complaint, is to recover possession of a strip of land fifty-three by four hundred feet, which is included within the boundaries of block fifteen in the town of Ordway, Colorado.

Plaintiff in error succeeded to the rights of Cash, one of the original defendants, and filed a petition in intervention, was permitted to become a party to the action, and in fact is the only interested party defendant now before the court. In its petition it sets out copy of mortgage from Cash to itself, therein mortgaging a part of said block fifteen, the description of which is identical with that of the quit claim deed hereinafter referred to.

It appears from the record that block fifteen is a part of section fourteen, township twenty-one south, range fifty-seven west; and that on July 13, 1894, The Ordway Town & Land Company, then being the owner of said section fourteen, by

and through its board of directors, unanimously adopted a certain plat, Exhibit B, showing blocks, streets, etc., in the town of Ordway, in which appears said block fifteen, which plat by apt words dedicated to the public use of said town the public roads thereon shown. The plat was filed for record in the recorder's office October 27, 1894. Exhibit D is an enlarged copy of Exhibit B, and Exhibit E is a replica of Exhibits B and D, except that no dedication appears written thereon, and that some of the blocks thereon shown are platted into lots. Exhibit A, a plat filed for record September 23, 1895, shows certain blocks, lots and streets, in the town of Ordway, but does not show block fifteen. The plat designated Exhibit B is inscribed as follows: "The Ordway Town & Land Company's Subdivision of section 14, township 21 south, range 57 west, Otero County, Colorado." On all the plats and exhibits just mentioned, the east line of block fifteen and the west line of block sixteen are coincident, and no road or public highway is shown to exist between said blocks or within the boundaries of either thereof.

The record also shows that The Ordway Town & Land Company is a domestic corporation, organized in 1890; that the town of Ordway was incorporated August 29, 1900; that on July 14, 1894, the land company, by warranty deed, conveyed said block fifteen to Wm. C. Bradbury, describing in part the premises conveyed as follows: "Block No. * * * 15 * * * according to the plat and subdivision of said section fourteen, made by The Ordway Town & Land Company, and of record in the office of the County Clerk and Recorder of Otero (now Crowley) county, Colorado;" that on September 20, 1905, said Bradbury, by warranty deed, conveyed to Thornton H. Cash the east one-third of said block, in these words: "The E one-third of block 15, in the town of Ordway, Colorado;" that on May 26, 1906, said Bradbury, by warranty deed, conveyed to Thornton H. Cash and J. Homer Peck the remaining portion of said block, in these terms: "The W two-thirds of block 15 in the town of

Ordway;" that on May 29, 1906, said Cash and Peck, by warranty deed, conveyed to defendant "Right Reverend C. Matz, Bishop of Denver, to be held in trust for the Catholics of Ordway" the west two-thirds of said block fifteen, in the following terms: "The W two-thirds (⅔) of block number fifteen (15) in the town of Ordway, according to the recorded plat of said town," and certain water rights.

Plaintiff in error claims that an eighty-foot street runs north and south through the east portion of said block fifteen, that the city has for years maintained such street and used the same as a public thoroughfare, laid water pipes along the same, graded and otherwise improved it. If this contention prevailed it would leave block fifteen, from east to west, only 350 feet instead of 430, as shown by the plats in evidence, and would leave the west two-thirds of the block, purchased by defendant in error, only 233⅓ feet from east to west, instead of 286⅔ as claimed by him. The only question for determination is whether or not the alleged eighty-foot street exists in the easterly portion of said block fifteen. The city is not a party to the suit, and the decree does not purport to foreclose any rights it might have concerning said street. The principal evidence relied upon by plaintiff in error to sustain its case, is that concerning the alleged street along the east portion of the block, and the exercise of supervision by the city over the same, and the recognition by defendant in error as well as by other people of the existence and use of such street; and the further evidence that prior to the time Cash and Peck sold the premises to the bishop they had agreed between themselves that the eighty-foot street existed as stated, and that they would recognize the same. All this evidence, however, is controverted, and the court specifically found that no such street existed. The only documentary evidence of a street running north and south through the easterly portion of block fifteen is an old map, Exhibit 3 (identical with Exhibit 1) offered in evidence by plaintiff in error, but upon objection excluded by the court. It showed a street

eighty feet wide running north and south through the eastern part of block fifteen. The evidence shows this old map, which contains the inscription "Plat of the Town of Ordway," was made by Mr. Hills at the request of Mr. Ordway in April, 1890. It was never recorded. There is no dedication thereon, and it is not shown to have ever been promulgated by the land company as an official map, to be used and relied on by it or by the public at large, nor is it shown to have ever been referred to in any deed made by the land company, or any of its grantees, when conveying property included therein. Whatever may have been the purpose of its creation it is conclusively shown to have never been recognized by the land company as showing the true lines on any lot, block, street or alley, within the boundaries of the town of Ordway. This repudiation of the map by the land company is clearly manifested in the recital found on the map Exhibit B, viz:

"This certifies that The Ordway Town & Land Company was originally the legal owner of all of section fourteen (14) township twenty-one (21) south of range fifty-seven (57) west, in Otero county, state of Colorado; that this plat is made and filed in strict accord with deeds heretofore made of a part of its lands within said section fourteen (14); that this plat confirms said deeds and description and is in no way or manner in conflict therewith; that the title to the remaining portion of its lands in said section fourteen (14) hereby platted is clear and free from all liens and incumbrances and that the public roads platted and noted thereon of various widths are hereby dedicated by this act to the public use."

There is only one map of record, Exhibit B, in which is shown block fifteen entire, as it was at the time the deeds heretofore mentioned were executed and recorded. The very first deed from the land company to Bradbury, given July 14, 1894, describes the land as "block 15 according to the plat and subdivision of said section 14 made by The Ordway Town & Land Company," and recites that the plat was of record. This descriptive language is identical with the words found on the

plat Exhibit B. Under the evidence in the case this description could have no reference to any other plat than Exhibit B, which shows the line between blocks fifteen to sixteen to be coincident. It is true that, notwithstanding the recital in the deed that the plat referred to was of record, the evidence shows it was not recorded until October 27th of the same year, about three months after the date of the deed. Still, the recital found on the map itself, as recorded, clearly and unequivocally confirms the deed, and recites that the plat was made and filed in strict accord with this deed, as well as all others given prior to recording of the plat, for land included within the same. Any layman reading the deed and examining the plat would readily find therefrom that the whole of block fifteen, as shown by the plat, was deeded to Bradbury. After this suit was begun, and on April 2, 1909, said Cash, by quit claim deed, conveyed a portion of block fifteen to plaintiff in error, in the following words:

"The south 375 feet of the east one-third of block 15 in The Ordway Town & Land Company's Subdivision of sec. 14, twp. 21 south, range 57 west (and also known as the town of Ordway)."

In its brief plaintiff in error strenuously contends that all the deeds affecting block fifteen, from the land company and its grantees, down to the deed from Cash and Peck to defendant in error, describe the land in such a way that no one can tell therefrom what property was conveyed by such deeds. In other words it urges that in none of such deeds is the description therein found connected with the recorded plat, Exhibit B, and that no proper reference to such plat can be found in any of such deeds. We are not impressed with this contention, or with the soundness of such reasoning. It appears to the court entirely clear that no other property was referred to in said deeds than block fifteen as shown in the recorded plat, Exhibit B, and that the descriptions plainly refer thereto. That plat shows the block to be 400 feet north and south by 430 feet east and west, without any street whatever

included therein or adjoining it on the east; and that defendant in error purchased the west two-thirds thereof. The undisputed testimony of several witnesses discloses that a great number of deeds, conveying divers lots and blocks in the town of Ordway had been recorded, and that it was the usual custom in that neighborhood to write the descriptions therein in substantially the same words as found in the descriptions in those deeds we have heretofore mentioned, that is to say, "Lot * * * block * * * in the town of Ordway." Moreover, in a number of mortgages, as well as in the quit claim deed given by Cash himself to plaintiff in error, the descriptions therein refer to the recorded plat, Exhibit B, for identification of the property intended to be therein conveyed. In no deed is any mention made of a street between blocks fifteen and sixteen. The evidence is conclusive that no other block fifteen exists within the corporate limits of said town, and that the subdivision of section fourteen by the land company referred to in the original deed from that company to Bradbury is entirely within the limits of the incorporated town of Ordway, with the exception possibly of a small part lying south of the Missouri Pacific railway. The only title Bradbury had to block fifteen (which he afterwards conveyed to Cash and Peck, who in turn conveyed to defendant in error) was the title that passed by the warranty deed from the land company to him, dated July 14, 1894, and that deed specifically referred to the company's subdivision plat of section fourteen, Exhibit B, the language in the deed being almost identical in that respect with that found on the plat. It is true that the deed refers to the plat as being recorded, though, as we have shown, the plat was not recorded until about three months thereafter. The record shows, however, that the plat was in existence, and had been approved by the board of directors of the town on July 13, 1894, the day before the company executed Bradbury's deed. The recital on the plat, above quoted, clearly shows that all deeds given by the company prior to the recording of the plat, with their

descriptions, were executed and delivered, and intended to be executed and delivered, by the company, according to said plat, Exhibit B. That exhibit is the only recorded plat showing block fifteen and adjoining blocks and streets within the corporate limits of Ordway, and those deeds reciting that they conveyed certain portions of "block fifteen in the town of Ordway," sufficiently identified the property conveyed as being the block fifteen, according to its lines and location, appearing on said Exhibit B.

The above reasoning is in direct conflict with that of counsel for plaintiff in error, who urgently contends that neither Exhibit B, nor any other map of record, is designated in terms as a plat of the town of Ordway, hence there is no warrant in law for identifying the block fifteen, called for in the descriptions, by a reference to the plat Exhibit B. It is significant to note in this connection that in the petition of intervention of plaintiff in error it claims recovery for.

"The S. 375 feet of the E. ⅓ of block 15 in The Ordway Town & Land Company's Subdivision of section 14, township 21 S, range 57 W (also known as the town of Ordway)."

Here the petitioner itself uses the same description as found in defendant in error's deed from Cash and Peck, and then adds thereto the statement that the subdivision is "also known as the town of Ordway." Plantiff in error ought not to complain of the description used in the deed from Cash and Peck to defendant in error, when it adopts the same description as a basis for its recovery.

From our reading of the record we are persuaded that the description of the property found in the deed from Cash and Peck to plaintiff Matz, for the west two-thirds of block fifteen, taken in connection with the writing found on the plat, Exhibit B, clearly shows that the property thereby conveyed was in fact the west two-thirds of block fifteen as shown by that map, and that said block fifteen was 430 feet from east to west and 400 feet from north to south, and no

street or public way existed on its eastern boundary, or within the lines thereof. Entertaining this view, we do not think that there is any ambiguity or uncertainty in the description, or in any of the deeds previously made purporting to convey the same premises. This being our conclusion, it becomes unnecessary to consider at length the numerous authorities cited by counsel relative to correcting defective descriptions in deeds in an action at law. Even if we assume that the descriptions in the deeds composing plaintiff's chain of title required extrinsic evidence to identify the specific land intended to be, and which in fact was, conveyed thereby, then the evidence adduced by plaintiff undoubtedly cured any uncertainty in the descriptions and rendered the deeds effective as conveyances. No error was committed by the court in admitting the evidence it did, which tended to show what property was conveyed by the descriptive words used. Counsel for plaintiff in error further contends that the trial court fatally erred in admitting, over his objections, the evidence tending to explain what land was referred to by the descriptive words used in the deeds; and that the effect of such evidence was to show that the deeds conveyed a different tract of land than that described therein, which would only be permissible in a suit in equity to reform the deed. If such a situation were disclosed by this record, counsel's position would be unanswerable, but this court and counsel are far apart in their analysis of the record respecting these matters. We reach an opposite conclusion to that of counsel upon the record showing as to the facts disclosed. The evidence introduced by plaintiff tended to show that the descriptive language found in the deed from Cash and Peck to himself necessarily and exclusively referred to the identical block fifteen, as it appeared in the recorded plat, Exhibit B. It in no way tended to vary the meaning of the words, or to make the description fit a different tract of land than that described, to-wit, block fifteen. If from such evidence it appeared that the language used in the description was such as was com-

monly used in describing the same property in deeds of sale in that locality, such evidence would be admissible in such an action as the one at bar. In such case a suit in equity to reform the deed would not be necessary to authorize the introduction of such evidence.

Sullivan v. Collins, 20 Colo. 528, 39 Pac. 334, involved a contest for real property between the claimant under a tax deed and the owner of the premises. The treasurer's deed described the property as "Lot 5, block 144, East Denver, Arapahoe county, Colorado." The premises were platted as part of "Clement's Addition to the city of Denver," such plat being of record. On the plat the disputed premises were described as "Lot 5, block 144, Clement's Addition to the city of Denver." The tax claimant contended that the property described in the plat as "Lot 5, block 144, Clement's Addition to the city of Denver," was clearly as well known by that description as by the description "Lot 5, block 144, East Denver." The trial court admitted oral testimony for the purpose of showing that the two descriptions applied to one and the same piece of property, and that the property was as well known by the one description as by the other. The owner urged that fatal error was committed by the trial court in admitting this testimony. The Supreme Court sustained the lower court's ruling, using in part this language:

"It is a fundamental principle of the law of real property that oral evidence is admissible for the purpose of showing that a description used in a conveyance, as commonly understood in the vicinity, clearly designates the property."

That case appears to be squarely in point, as the undisputed evidence in the case at bar shows that for a long period of time innumerable deeds had been recorded, therein conveying portions of blocks shown in Exhibit B by the brief description "Block * * * in the town of Ordway," and such was the customary language used in the community for conveying parts of said block fifteen, and it was the common

understanding in that locality that such description appplied to the identical block fifteen shown by said map, Exhibit B.

In *Laughlin et al, v. Hawley,* 9 Colo. 170, 11 Pac. 45, the question of the sufficiency of the description in the sheriff's deed was involved, it being contended by one of the parties that the sheriff's deed was void for uncertainty in the description. The court said in part:

"Where the description of the property is in such general terms as to call for evidence *dehors* the writing, parol evidence is admissible to apply it to the subject matter, and thereby render certain what would otherwise be doubtful and indefinite. 'If, from such evidence, it appears that the terms used, as commonly understood in the neighborhood, clearly designate the property levied upon or sold, the description must be regarded as sufficient.' Freem. Ex'ns, § 281; *Pipe v. Smith,* 4 Colo. 466."

From *Stanley v. Green,* 12 Cal. 148, we extract the following:

"This is an action of ejectment to recover the possession of certain premises situated in the county of Napa. * * *

"That the evidence of the circumstances under which the deed was executed is admissible does not admit of a question. These circumstances place the court in the position of the parties, and enable it to interpret intelligently the language used by them. It is not to contradict or vary the terms of the instrument, that the evidence is received, but to apply them to the subject matter. * * * A designation of the tract by a particular name or number is sufficient; and if it can be rendered certain by extrinsic evidence, this is as good a description as one by metes and bounds. It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence."

None of the evidence in the case at bar tends to contradict or vary the terms of the plaintiff's warranty deed for the west two-thirds of block fifteen. It goes no further than to apply the descriptive words used to the subject matter of the conveyance. Other cases of equal force, following the rule, are: *Blair et al. v. Bruns,* 8 Colo. 397, 8 Pac. 56; *Pipe v. Smith, supra; Chambers et al. v. Watson et al.,* 60 Ia. 339, 14 N. W. 336, 46 Am. Rep. 70; *Scheible v. Stagle,* 89 Ind. 323; *Caldwell v. Village of Carthage,* 40 Ohio St. 453; *Derham v. Hill,* 57 Colo. 345, 142 Pac. 181; 13 *Cyc.* 544. In most of the cases above cited the actions were in law, or in ejectment, or in the nature of ejectment, to recover possession of real property.

Counsel for plaintiff in error has earnestly discussed numerous assignments of error, each of which has received careful consideration by the court, but as the decisive question involved has been already determined in favor of the judgment below, no good purpose can be accomplished by discussing at length all the points raised. We will briefly notice two questions raised, which counsel seems to think necessitate a reversal.

First. It is contended that the amendment of plaintiff's complaint allowed by the court changed the action from one at law to one in equity. We do not think this claim tenable. Plaintiff nowhere, in the original or amended pleading, asked or suggested that his deed be reformed. The substantial, specific prayer of plaintiff's pleadings, however, is for possession of the premises in dispute, and that he be put in possession and defendant be ousted therefrom. Throughout the trial and in this court defendant in error has tenaciously contended that his title deeds are sufficient in an action at law and there is no reason whatever for a suit in equity to reform the same. He suggests that his amendment was not necessary, but was filed from over-abundance of caution. However that may be, we think the record shows this proceeding to be an action at law, and that the evidence admitted by the court did not tend

to vary the terms of the deed, but merely explained what was meant by the descriptive words used.

Second. Plaintiff in error asserts that the town of Ordway was an indispensable party. This point seems to be wholly without merit, as the entire ground claimed and sued for by plaintiff below, and recovered by him, in no way conflicts with the eighty-foot street claimed by defendant to exist. That street (if it is a street) lies on the east boundary of said block fifteen, and would come wholly within the east one-third of that part owned by Cash as shown by the record. It would in no way conflict with the west two-thirds of the block. If the city had been impleaded in the first instance, it is more than likely that it would have pleaded a disclaimer. It is apparent that this controversy is wholly between plaintiff in error and defendant in error, and that the city was in no way an indispensable party, not even a necessary party. The record fails to disclose that plaintiff below was making any claim to such street or attempting to exercise any dominion over any part of the same.

Perceiving no error in the record, the judgment will be affirmed.

Judgment Affirmed.

Decided October 13, A. D. 1914. Rehearing denied November 9, A. D. 1914.

[No. 3902.]

BUFFALO SPECIALTY COMPANY V. GOUGAR ET. AL.

1. CONTRACTS—*Construction.* In construing a contract the courts will consider not only the terms employed therein, but the attending circumstances. (528)

2. —— *Public Policy.* The courts are not hasty to declare void a contract deliberately entered into, upon consideration and not under the influence of any misrepresentation or false practice. But where a contract manifests upon its face a tendency to produce a condition prejudicial to the public it will be declared void. (528)

3. CONTRACT SUED UPON. It is stipulated in writing that the plaintiff in error owned the patent charged to have been infringed, and that it secured to the plaintiff in error the exclusive right to manufacture, use

and sell any fluid or compound for automatically healing punctures in pneumatic tires, and that such patent was valid; and the defendants in error admitted therein that they had infringed the same, and had thereby done the plaintiff in error considerable damage, and stipulated in consequence thereof, if plaintiff in error would forego bringing a suit for damages and an injunction, which was threatened, that defendants in error would not be guilty of future infringements, and bound themselves in the sum of $500.00 to keep such stipulation, and agreed that said sum should be liquidated damages, but should not include any damages that might be suffered for infringements subsequent to the date of the contract. *Held* that, under the admissions in the complaint on demurrer, and assuming everything charged in the complaint as true, said obligation does not manifestly tend to injure the public.* (530, 531)

4. CONSTRUCTION OF CONTRACT. The amount of $500 mentioned in the written obligation as liquidated damages suffered prior to the date thereof was litgated in No. 3717 in this court. *Held* that, there being no provision in said written obligation for the recovery of damages for infringements subsequent to the date thereof, except as follows: "but not for damages suffered subsequent to said date," it did not add to or take from the plaintiff in error any rights or remedies it had under the acts of Congress; and, therefore, the complaint, based upon such written obligation, did not state a cause of action, nor did said written obligation have the effect of depriving the U. S. courts of the exclusive jurisdiction to try causes for infringements of patent rights.* (530-532)

5. JURISDICTION—*Of Subject Matter—Defect Of.* The want of jurisdiction on the ground of subject matter is incurable by laches of the parties, and whenever discovered it is the duty of the court, on suggestion of counsel, or on its own motion, to dismiss the action.* (533)

6. PATENT—*Contract or Stipulation Not to Contest Validity Of.* The provision in the obligation that the defendants in error shall not question the validity of the patents of plaintiff in error, if not enforceable, is insufficient to justify the sustaining of the demurrer on the ground that the written obligation contravenes a sound public policy; but King, J., Cunningham, P. J., and Hurlbut, J., were of the opinion that, inasmuch as the public are interested in the suppression of void patents, which ostensibly create a monopoly in articles extensively used by the public, it was against the policy of the law to give effect to a contract which might protect the false claims of one asserting such patents, and deter manufacturers and dealers from contesting their validity and scope.*

*Syllabi by King, J.

Error to Denver District Court. HON. HARRY C. RIDDLE, Judge.

MR. E. G. MANSFIELD, MR. WM. P. KAVANAGH and MR. JOHN HORNE CHILES for plaintiff in error.

MR. R. D. THOMPSON for defendants in error.

BELL, J.

This is the second action brought in the District Court of the City and County of Denver on a written obligation, in the general form of a penal bond, executed by the defendants in error, as co-partners, to The Buffalo Specialty Manufacturing Company, a corporation, of Buffalo, New York, and by it assigned to The Buffalo Specialty Company, a corporation organized and existing under and by virtue of the laws of the State of New York, plaintiff in error herein, and which obligation is in words and figures as follows:

"This agreement made and entered into this 28th day of July, 1903, by and between The Buffalo Specialty Manufacturing Company, a corporation, of Buffalo, New York, party of the first part, and George L. Gougar and William H. Todd, co-partners, doing business under the firm name and style of Gougar & Todd, at Denver, Colorado, parties of the second part.

"Witnesseth, that whereas, the party of the first part is now and for some years past has been the owner of Letters Patent of the United States of America No. 578551, issued on the 9th day of March, 1897, to Charles E. Duryea and his assignee, The Indiana Rubber & Insulated Wire Company of Marian, Indiana, which letters patent secure to said party of the first part the full, complete and exclusive right to manufacture, use and sell all liquids, semi-liquids, powders or compounds for the purpose of automatically healing or closing punctures in pneumatic tires or articles, and

"Whereas, the said parties of the second part are now and have been for some time past carrying on and conducting a certain bicycle and automobile business in the said City of Denver, and have also been manufacturing and selling certain tire compounds or mixtures known as 'Elastic Tire Restorer' and 'Elastic Solution,' which articles come in competition with the articles manufactured and sold by said party under said, and other patents for the same purpose, thus causing to said first party considerable damage, and

"Whereas, said first party is about to commence suit against said second parties to restrain such infringement, and also to recover said damages, now therefore, for and in consideration that said party shall not bring said suit, and the further consideration of one dollar ($1.00) to them in hand paid by said first party, the receipt of which is hereby acknowledged, said second parties individually and as co-partners do hereby covenant and agree to and with said first party as follows:

"1. That said letters patent and all other letters patent now owned by said first party or in which it has an interest covering the manufacture, use or sale of any fluid, semi-fluid, powder or compound for automatically healing or closing punctures in pneumatic tires are good and valid patents, and that said second parties will not hereafter, directly or indirectly, question either the validity of said patents or the exclusive right of said first party to manufacture, use and sell any and all liquids, semi-liquids, powders or compounds for such use.

"2. That said second parties will on or after the date hereof cease the manufacture, use or sale of any and all fluids, semi-fluids, powders or compounds, or preparations whatsoever to be used for automatically healing or closing punctures or vents in pneumatic tires or articles, and that they will not hereafter during the life of said patents or either of them, individually or as co-partners, make, use or sell or offer for sale or be interested directly or indirectly in the manufacture, use or sale of any fluid, semi-fluid, powder, compound or mixture for automatically healing or closing punctures or vents in pneumatic tires or articles. Except, however, that said second parties have at all times the right to use any and all such articles for such purposes manufactured by the party of the first part.

"3. That if said second parties or either of them shall in any way violate this agreement on their part at any time

during the life of said patents or either of them, that then and in that event they shall pay to the party of the first part as liquidated damages and not as a penalty the sum of five hundred dollars ($500), which amount may be recovered in an action at law hereon, and which amount when so recovered will be in full for all damages sustained by said first party on account of the said second party infringing said letters patent prior to the date hereof, but not for damages suffered subsequent to said date.

"4. That in the event said second parties shall keep and perform on their part all and singular the conditions hereof the said first party does hereby waive all right and claim to damages heretofore suffered by reason of said second party's having infringed said patents.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

GOUGAR & TODD (Seal)
WM. H. TODD (Seal)
GEORGE L. GOUGAR (Seal)
BUFFALO SPECIALTY MFG. CO. (Seal)
E. T. BROWN.
(Seal containing the words 'Buffalo Specialty Manufacturing Company' in a circle and the words 'Incorporated Sept. 12, 1885,' within the circle.)"

It will be observed that in this written obligation the defendants in error expressly admit that the assignor of the plaintiff in error was the owner of the letters patent described therein; that they, the defendants in error, had infringed said letters patent prior to the date of the obligation; that said assignor had suffered considerable damage by reason of such infringements; that it was about to bring suit for a restraining order preventing future infringements and for damages; and to avoid suit, etc., the defendants in error covenanted to desist from future infringements, and in consideration there-

of, said assignor covenanted to waive the infringements committed prior to the date of the written obligation, "but not for damages suffered subsequent to said date."

The plaintiff in error in its complaint avers that the defendants in error continued such infringements from the date of the written obligation until the time of the commencement of this action, to its damage in the sum of $10,000, and further avers the acts of infringement were wanton and malicious, and, therefore, prays for an award of exemplary damages in the sum of $5,000.

The defendants in error demurred to the complaint for many reasons, among which was a lack of jurisdiction of the subject matter, because the obligation contravened a sound public policy, etc. The court sustained the demurrer on the ground that said obligation was against public policy.

In the absence of mistake, fraud, misrepresentation, deceit or other unfair means employed in securing contracts, courts are not hasty in declaring them void when they appear to be deliberately entered into for valuable considerations. However, if a contract on its face manifests a tendency to bring about a condition detrimental to the public weal, then it is the duty of the courts, not for the protection of the participants therein, but in the interest of the public welfare, to declare it void: 23 *Cyc.* 455; *Russell v. Courier P. & P. Co.*, 43 Colo. 325, 95 Pac. 936.

If the tendency of the obligation hereinbefore set forth is obviously detrimental to the public good, then the conclusion and judgment of the District Court should be affirmed. In construing this written obligation, the court should summon to its aid the attending circumstances and give proper weight to the terms employed therein in the light of the surrounding conditions.

It appears from the instrument sued upon, that the plaintiff in error owned letters patent from the United States, No. 578551, and the parties to the written obligation mutually

admit therein that such letters patent secure to the plaintiff in error, by the subsequent assignment thereof, the full, complete and exclusive right to manufacture, use and sell, all liquids, semi-liquids, powders or compounds for the purpose of automatically healing or closing punctures in pneumatic tires or articles. It is further admitted in said written obligation that the defendants in error were conducting a bicycle and automobile business in Denver, Colo., at the date of said obligation, and for a long time prior thereto, and during said time, manufactured and sold a mixture known as "Elastic Tire Restorer" and "Elastic Solution," which articles came in competition with articles manufactured and sold by the predecessor in interest of the plaintiff in error under said letters patent No. 578551, and other patents for the same purpose. It is further admitted in said written obligation that said predecessor in interest was about to commence suit against defendants in error to restrain such infringements and for damages, and in consideration that it would not bring said suit, the defendants in error covenanted and agreed that it owned such letters patent and that they gave it the exclusive right to the manufacture, use or sale of any fluid, semi-fluid, powder or compound for automatically healing or closing punctures in pneumatic tires, that they were good and valid patents, and that they, the defendants in error, would not in the future question their validity or the exclusive right of said predecessor in interest to manufacture, sell and use said fluids and powders for the uses therein mentioned; and for the same consideration, defendants in error agreed to cease the manufacture, sale or use of any of the protected fluids or powders subsequent to the date of said written obligation. Said predecessor in interest agreed to waive the collection of the "considerable damage" suffered while the defendants in error kept the provisions of such obligation on their part. The written obligation gave defendants in error the right to use any and all of said fluids and powders, at any and all times, manufactured by the owner of said letters patent.

Now, assuming everything in the complaint that is well pleaded, including the admissions in the written obligation, as true, as we must, then does said obligation manifestly tend to injure the public?

This question must be answered in the negative. If the plaintiff in error, in fact, owned the letters patent and they secured it the exclusive rights to manufacture and sell the products described in the written obligation, then the complaint should stand the test of the demurrer on the charge that the obligation contravenes a sound public policy.

Letters patent endow the owner of the invention with the exclusive right to make, use, and vend the patented invention throughout the United States and the territories thereof, during the period for which the patent was granted, and, therefore, such a monopoly cannot be considered *ipso facto* in contravention of a sound public policy: 3 Robinson on Patents, secs. 884 and 890.

We do not wish to be understood as intimating that defendants in error are remediless on the merits of the action by reason of said admissions in the written obligation, or that they may not, on appropriate pleadings and proof, be relieved from the effects thereof.

A very serious question is involved in the first cause of demurrer, questioning the jurisdiction of the District Court to hear and decide the subject matter involved in the controversy. The jurisdiction has been vested in the Federal Courts over all cases arising under the patent laws of the United States: 3 Robinson on Patents, sec. 855; *Read v. Miller,* 3 Fisher 310, s. c., 2 Bissell 12, 12 Fed. Cas. No. 11,610.

Controversies involving the existence and preservation of the monopoly awarded under patents are said to assume any one of three forms: (1) An affirmation and denial as to the legal existence of the monopoly in favor of any person; (2) An affirmation and denial as to the existence of the monopoly in favor of the patentee; (3) An affirmation and denial concerning the character of the matters embraced in

the monopoly. In the first form, it is held that the patentability of the invention is the subject of dispute; in the second, the title of the patentee or his assignee; in the third, the scope of the monopoly, or in other words its existence as to certain instruments or operations claimed by the patentee to lie within it. It is said that none of those controversies can be decided without affecting the monopoly and enforcing, enlarging, or curtailing the rights created and bestowed under the patent laws; while if the patentability and scope of the invention, and the title of the patentee are conceded, there can be no question in relation to the existence and continuance of the monopoly. Cases not presenting one or more of these three forms of controversy are, therefore, not cases arising under the patent laws: 3 Robinson on Patents, sec. 857; *Hyatt v. Ingalls,* 49 Sup'r Ct. (N. Y.) 375-378.

The complaint strictly limits this action to violations of the written obligation sued upon, as far as mere words in pleadings can circumscribe it. However, is not the purpose of the action to recover damages for infringements of United States patents? The acts charged in the complaint unquestionably violate that provision of the written obligation wherein the defendants in error covenant that they will not, subsequent to the date thereof, manufacture, use or sell any of the fluids or powders described therein for automatically healing or closing punctures or vents in penumatic tires or articles. However, the patent rights are alleged in the complaint to secure to the plaintiff in error a monopoly in the manufacture, sale and use of the same fluids, powders and articles, and for the same purposes mentioned in the obligation. The primary purpose of the written obligation appears to be to settle for the infringements prior to the date of the obligation aforesaid and to waive the damages stipulated therein, on condition that the defendants in error would not be guilty of future infringements. There is nothing provided as to the manner or method of estimating the damages or the payment thereof for future infringements. This leaves the written obligation

simply providing that the amount stipulated therein shall be liquidated damages and in full payment for all infringements prior to the date thereof, "but not for damages suffered subsequent to said date." This negative provision in the obligation seems to have been used as a mere precaution to make it clear that the stipulation therein as to the liquidated sum should affect in no wise any damage that might arise for infringements subsequent to the date thereof. It is difficult to see wherein the written obligation can perform any useful function in this action, further than as an instrument of evidence in the nature of a written admission against the interests of the defendants in error. If the action is, indeed, a direct means of recovering for infringements of the patents subsequent to the date of the written obligation, and the written obligation does not materially modify such right of action or add to the legal rights of the plaintiff in error in such recovery, further than it may be used as evidence as aforesaid, then it would seem that this action should be held to be, in fact, based upon an infringement of the patents, rather than a collateral action on the written obligation.

The mere issuance of the patent and the proper assignment thereof confers upon the plaintiff in error the exclusive right to make, use and vend the patented invention throughout the United States and the territories thereof during the life of the patent. The infringement of the patent consists of the very acts of manufacture, use or sale of the invention protected by the patent within the area aforesaid during the life of the patent as described in the contract, and the contract does not seem to prohibit any infringement that the federal law does not likewise prohibit.

In paragraph 1 of the written obligation, the defendants in error, as a consideration that said suit should not be brought, and that they should not be required to pay the liquidated damages expressed therein, confessed in writing that the patents described in the said obligation were good and valid patents for the purposes therein described, and stipulated

that they would not question the validity thereof, and that they would cease the infringements thereafter for the same consideration; and these promises were because of the stipulations aforesaid on the part of the plaintiff in error. Upon the alleged violation of the written obligation by future infringements succeeding the date thereof, plaintiff in error brought a former suit for the recovery of the amount provided for as damages for infringements prior to the date of the obligation, secured the judgment of the District Court therefor, and the record of the proceedings was reviewed in this court, and numbered C. A. 3717.

The want of jurisdiction on the ground of subject matter is incurable by *laches* of the parties, and whenever discovered, it is the duty of the court, on suggestion of counsel or on its own motion, to dismiss the action: 3 Robinson on Patents, sec. 866; *Spring v. Domestic Sewing Mach. Co.,* (C. C.) 13 Fed. Rep. 446; *Teas v. Albright,* (C. C.) 13 Fed. Rep. 406; *Blanchard v. Sprague,* 1 Cliff. 288-299, Fed. Cas. No. 1516; *Creamer v. Bowers,* (C. C.) 30 Fed. Rep. 185.

The rule is laid down in 3 Robinson on Patents, sec. 863, regarding the jurisdiction of the courts in cases involving patents or rights thereunder, as follows:

"Where jurisdiction is exclusively conferred on one tribunal on the ground of subject matter, no other tribunal can in any manner obtain cognizance thereof. Neither the convenience nor the consent of the parties can bestow a power which the law has expressly or impliedly withheld, and though for want of this the interests of parties are imperiled, it is a defect in practical jurisprudence which the law itself and not the courts must remedy. Thus in regard to cases which arise under the patent laws, and over which exclusive jurisdiction has been invested in the federal courts, no state court can under any circumstances assume to exercise its judicial powers. Under whatever guise an action may be brought, if in reality it is a case which puts in issue and requires a judgment upon the existence or continuance of the monopoly cre-

ated by a patent, it is the duty of the local court to dismiss it or provide for its removal to the courts by whom alone such issues can be lawfully determined."

It is apparent that there is no collateral cause of action supportable on any provision of the written obligation, and if the plaintiff in error must rely upon the action upon the collateral written obligation, then it must fail because it does not state facts sufficient to constitute a cause of action. If, upon the other hand, the complaint does state a cause of action for the infringement of letters patent, though formally alleged upon the written obligation, then the case must be dismissed, because every action for the infringement of a patent, whether at law or in equity, must be brought in the Federal courts: 3 Robinson on Patents, sec. 933; U. S. Revised Statutes, sec. 629, cl. 9 (Comp. Statutes 1901, p. 504).

Wherefore, we affirm the judgment of the trial court, but upon different grounds than those stated therein.

Affirmed.

KING, J., *specially concurring:*

I concur in affirming the judgment of the District Court, but place my concurrence on the ground that the contract sued on is void because against public policy and in undue restraint of trade.

There is no doubt that the suit is predicated on the contract, and that only, and demands damages for alleged violation of its conditions, whether that violation consists of acts amounting to an infringement of a patent or in the manufacture, use and sale of, or being interested in, articles (possibly not patented or patentable), the manufacture, use and sale of which is inhibited by the agreement, under the pretense that they are covered by letters patent.

By the express terms of the contract, defendants covenanted and agreed that the letters patent named therein, as well as all other patents in which plaintiff had or might have an interest, covering the manufacture, use or sale of any fluid,

semi-fluid, powder or compound for automatically healing or closing punctures in pneumatic tires and articles are good and valid patents, and that defendants would not thereafter, directly or indirectly, question the validity thereof, or the exclusive right of plaintiff to manufacture, use and sell any and all liquids, semi-liquids, powders and compounds for such use; and, further, that defendants would not thereafter, during the life of the patents, "make, use or sell, or offer for sale, or be interested, directly or indirectly, in the manufacture, use or sale of, any fluid, semi-fluid, powder, compound or mixture for automatically healing or closing punctures in pneumatic tires or articles."

It is obvious that if the agreement is enforceable, the defendants are estopped from disputing the validity and scope of the patent named, or of any other patent in which plaintiff may be interested, even although absolutely void or worthless. The public is vitally interested in having worthless patents that ostensibly create a monopoly in articles extensively used by the people, destroyed, and it is against the policy of the law to enforce or give effect to a contract, such as this, which might protect a patentee's claims under such patents, and estop or deter manufacturers and dealers from contesting their validity and scope. The recitals in the contract admitting the validity of the patents and plaintiff's rights thereunder do not preclude the application, in defendants' favor, of the bar raised by their plea that material parts of the contract contravene public policy. The admissions of validity and scope, as well as the agreement not to contest, are a part of the general scheme to stifle competition. The public may be regarded as a party to every suit in which questions of public policy are involved. The right of a litigant to make and rely on that defense, notwithstanding his admissions and stipulations, is not conceded for his protection alone, nor primarily. It is not a private right to the individual only, but is founded on public policy, which is promoted by his making the defense, and contravened by his refusal to make it.

A contract strikingly similar, in many of its aspects, to the one here under discussion was considered by the Supreme Court of the United States in *Pope Mfg. Co. v. Gormully*, 144 U. S. 424, 36 L. Ed. 414, 17 Sup. Ct. 632, and I quote from that opinion in support of my position:

"It is rarely that this court is called upon to consider so unique a contract, and we have found some difficulty in assigning to it its proper place among legal obligations. Its requirement is not merely that the licensee shall refrain during the term of his license from infringing other patents than those which he is expressly authorized to use, but shall forever afterwards, at least during the life of such patents, refrain from importing, making or selling articles covered by them, and from *disputing the validity thereof or plaintiff's title thereto*, and shall afford his moral aid and assistance in securing proper aid and respect for such patents. * * * The *real question is whether the defendant can estop himself from disputing patents which may be wholly void, or to which the plaintiff may have no shadow of title.* * * * It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly; and it is a serious question whether public policy permits a man to barter away beforehand his right to defend unjust actions or classes of actions, though, in an individual case, he may doubtless assent that a judgment be rendered against him, even without notice. * * * With regard to all such matters of public policy, it would seem that *no man can bind himself by estoppel not to assert* a right which the law gives him on reasons of public policy." (Italics mine.)

Without deciding also that the contract sued on is absolutely void because it is without limitation as to the space or territory in which defendants obligate themselves not to compete with the plaintiff, I think the presence in the contract of such provision offers an additional and strong reason for hold-

ing the contract void. Such a provision is often held to avoid a contract for the reason that it is in restraint of trade.—*Webb Press Co. v. Bierce,* 116 La. 906, 911, 41 So. 203, 206; *Seay v. Spratling,* 133 Ga. 27, 65 S. E. 137; *Bishop v. Palmer,* 146 Mass. 469, 16 N. E. 304, 4 Am. St. 339.

Another feature of this contract which should add to its condemnation is the universality of its claims as to the substance or substances, ingredients and combinations constituting the patent. It is worthy of notice that the alleged violation of the contract or infringement of the patent by defendants does not consist in manufacturing, using and selling the same article maufactured by the plaintiff, the use of which was licensed, but that defendants were manufacturing, using and selling some article or articles for automatically healing punctures or vents in pneumatic tires. If so great a monopoly has been created by this patent as is claimed under the contract, and which defendants have agreed not to question, then it may be doubted whether "every miller engaged in the manufacture of wheat flour for domestic use would not be an infringer, and every druggist and grocer engaged in the sale of such liquid or dry commodities as glycerine, honey, molasses, wheat flour or cosmetic powders, would not be liable to be prosecuted for infringing this patent."

It is frequently held that state courts have jurisdiction to try an action for damages for the violation of a contract based upon patent rights, although the defense might be the invalidity of the patents, or that the scope of the patent did not include the article involved. There is no doubt of the right of the state courts to decide the question of law raised by the demurrer. Inasmuch as this suit is based on the written contract, I therefore prefer to place my concurrence upon the reason I have stated, rather than upon the jurisdictional question.

I am authorized to state that Cunningham, P. J., and Hurlbut, J., join in this special concurrence.

Morgan, J., concurs in the result reached in both the opinions of Bell, J., and King, J.

[No. 3947.]

EDWARDS V. ROBERTS.

1. WATER RIGHTS—*Nature and Foundation of the Right.* The right of the citizen to occupy the lands of the public domain in the arid region for the construction of ditches and reservoirs for irrigation has its foundation in necessity. The right always existed, and the acts of Congress which seem to grant such right, in reality only recognize and confirm it. (552)

2. —— *Intermittent Use of Works for Irrigation—Effect Upon the Right.* The use of works for irrigation, is, in all cases, with us, necessarily intermittent, depending upon the season, the crop, the rainfall, the relative priority of different ditches and reservoirs, and other similar considerations; but the easement is necessarily continuouus. Interruption of the use by the absence of water in the stream which is the source of supply, or the casual destruction of the works of diversion or storage, by floods, or the like, has not the effect to impair the appropriator's right. (550)

3. RESERVOIRS—*Easement For—Extent Of.* The area to which the lands of one person may be submerged by the reservoir of another, constructed while such lands were part of the public domain, is not to be extended beyond the limit of actual use, and should be restricted to the smallest area consistent with the useful enjoyment of the reservoir. (553)

4. CASES OVERRULED, explained or distinguished. Tynon v. Despain, 22 Colo. 240, and Blake v. Boye, 38 Colo. 55, explained. (546-548)

5. STATUTES—*Construed—Pacific Railroad Acts.* The act of Congress of July 26, 1866 (14 Stat. at Large, page 253, and its amendments) operate as a reservation from the congressional grant of land to the Union Pacific Railway Company in aid of the construction of its railroad, and in favor of the owner of irrigation ditches and reservoirs used in connection with water rights which became vested under the local customs and laws prior to the issuance of patent to the railroad company. Tynon v. Despain, 22 Colo. 240; Highline Canal Co. v. Moon, Id. 560, followed. (546, 547)

No distinction is recognized between ditches and reservoirs for irrigation. (547)

The right of the appropriator depends solely upon the reservation under the act of Congress, and not upon any agreement, express or implied.* (546-550)

6. NOTICE—*Claim of Reservoir Site.* The map of a reservoir site, with the required statement thereon, filed pursuant to the act of April 20, A. D. 1887 (Laws 1887, 314) is constructive notice of the contents thereof to all persons subsequently dealing with the lands described therein, as to the site of the reservoir.* (548)

7. ESTOPPEL—*By Conduct.* Land owner without objection or protest acquiesces in the construction by another of a dam or like works for the diversion or storage of water for irrigation, the effect of which is to flood and submerge a part of his lands; he is estopped from afterwards maintaining either ejectment or trespass for the entry. (549)

His only remedy is an action for damages and the right of action vests in the one having the title to the land at the time of the entry. (549)

8. EVIDENCE—*Judicial Notice,* taken, of the acts of Congress known as the Pacific Railroad Acts. (544)

*Syllabi by King, J.

Error to Weld District Court. HON. J. E. GARRIGUES, Judge.

MR. JOHN T. JACOBS for plaintiff in error.

MR. H. N. HAYNES, MR. JOHN C. NIXON, MR. THOMAS A. NIXON for defendant in error.

KING, J., delivered the opinion of the court.

For convenience, the plaintiff in error will be called defendant, and defendant in error will be called plaintiff, as in the trial court.

March 17, 1909, plaintiff purchased, and obtained a deed for section 29, township 6 north, range 63 west, Weld county, Colorado. September 22nd he filed his complaint, in the nature of ejectment, against defendant Edwards and one R. L. Dougherty, alleging ouster of the plaintiff from about 200 acres of said land, and asked for possession, and damages in the sum of $10,000. The act of defendant constituting the alleged ouster was the flooding, in the spring of 1909, of 119 acres of said section, by filling a reservoir known as the "Wadlin Reservoir," situated in part on said section 29, and in part on section 30, same township and range. Defendant was the owner of section 30, and attempted to justify, by pleading and proving that he was the owner of said reservoir; that he and his grantors constructed and had been in possession of the same, and used it for the storage of water for irrigation, beginning in the year 1888, and every year thereafter; that his right to use a portion of section 29 as an easement for his reservoir was superior to plaintiff's right to possession as

fee owner. This superiority of easement was based upon the allegations of two defenses: First, that at the time of the construction of the reservoir and ditch by which water was conveyed thereto, section 29 was owned by the Union Pacific Railway Company, by virtue of certain acts of congress, and that the ditch and reservoir were built and thereafter used with the knowledge, acquiescence and consent of said company and its grantees; second, that at the time of the construction of said ditch and reservoir, and for several years thereafter (until 1897), the title to said section was in the United States government; that prior to the issuance of patent to the railway company, defendant's grantor, Wadlin, by priority of possession and use, had acquired vested rights to the use of water for agricultural purposes to the extent of 44,000,000 cubic feet of water, to be carried through said ditch, and stored in said reservoir, the source of supply being Crow creek, a natural stream, and the carrying capacity of the ditch 135 cubic feet of water per second of time; that said rights had vested and accrued by virtue of local customs and laws, and by decisions of the court evidenced by an adjudication of water rights made in 1895, and that the right of way for the construction and maintenance of the ditch and reservoir, for the purpose of carrying and storing said water was granted by certain acts of congress and had priority of right for such purposes over the fee vested in the railway company by patent thereafter issued. Except for the allegation that the railway company was the owner of the land at the time the reservoir was made, the allegations of the answer were put in issue by replication; and by way of new matter it was alleged that all acts of defendant in flooding said lands were trespasses; that any use of the reservoir site by defendant and his grantors was intermittent, in occasional years or seasons only, with long periods of years of abandonment between, in which no water was placed in the reservoir, and no attempt made to place water therein; that the use of the reservoir for storage purposes was impracticable, and the land to be served thereby

not worth as much as defendant's land injured thereby.

Judgment was rendered, ousting the defendant from the possession, but granting to him thirty days in which to begin proceedings in eminent domain to condemn plaintiff's land for use as a reservoir site.

There is some conflict in the evidence. But certain matters are either admitted or not disputed by the evidence. Crow creek is a natural water way which in most years carries a great volume of water at flood seasons, but becomes practically dry in the latter part of every season, and in occasional years supplies very little water, if any, for storage. About the year 1888, John Wadlin began the construction of a ditch to convey water from Crow creek to his lands, including that in section 30, and at the same time located a reservoir site on the course of said ditch, and filed his sworn statement and map of the ditch and reservoir in accordance with the statute then in force. The reservoir as contemplated occupied a part of sections 29 and 30. As shown by the record, the dam of said reservoir was situated entirely upon section 30, the ends reaching to a short distance west of the west line of section 29, the grade falling westerly toward section 30. In 1892 said dam was completed and the reservoir filled so as to flood that portion of section 30 east of the dam, and a considerable portion of section 29, about 140 acres of which were claimed for reservoir, and the water so stored was used by Wadlin for irrigation purposes. It is admitted that in 1892, about 100 acres of section 29 were flooded; that in 1895, 1899 and 1904, more than 100 acres thereof were submerged, and that in the years 1894, '6, '7 and '8, 1901 and '3, thirty or forty acres of said section were submerged; but it is contended that in the years 1893, 1900, '2, '5, '6, '7 and '8, this land was not flooded at all. As to this latter contention there is some conflict. One witness testified that he ran water into the reservoir nine years out of eleven. The water so stored did not remain in the reservoir for many weeks during any season, as it was drawn out and used for irrigation, after which the

land in section 29 was used for pasturage, and in some instances produced a fair quantity of hay, which was harvested by the owners of section 29. It is not in evidence that the reservoir site was not used for storage at any time when there was water in the stream for storage purposes, except when the outlet of the reservoir or the dam in the stream washed out. In 1906 the original lumber outlet to the reservoir was replaced by a substantial cement outlet, and there is some evidence that the reservoir was filled that season. About the year 1907 the intake ditch was partially filled where a road crossed it, and so remained until the obstruction was removed in the spring of 1909 after plaintiff purchased the land. The dam was sometimes out of repair, but work was done on it from time to time and from year to year for the purpose of making it effectual. It is shown that Wadlin was the owner of a large body of land, subject to irrigation from the reservoir and ditch, but which had some other source of supply; the amount of land irrigated from the reservoir is not clearly shown. The land selected for reservoir site was a natural depression in which water stood before the building of the dam. In 1895 said reservoir was decreed priority No. 10, for 44,000,000 cubic feet of water.

Plaintiff deraigned title from the government by patent issued to the Union Pacific Railway Company, bearing date November 12, 1897, and by numerous *mesne* conveyances. Of plaintiff's grantors, F. C. Grable took title October 14, 1905. Grable conveyed to Ernest O. Ellsworth, September 29, 1906, and Ellsworth to plaintiff, March 17, 1909. The last two deeds of conveyance contained the following exception: "Subject to all existing ditch and reservoir rights." Grable had known of the existence of this reservoir for from fifteen to eighteen years. When plaintiff passed over the land in February, 1909, prior to purchase, and when at a place on said land from whence the dam could have been seen if he had looked, he was informed by the person showing him the land, that an old reservoir site was situate thereon, and soon

after his purchase he was notified by the owner of the reservoir, or some one representing him, that the land would be flooded. Soon thereafter the dam and intake ditch were repaired, and the reservoir filled from the flood waters to the extent that 119 acres of said section 29 were flooded. There is no doubt from the evidence that everyone in the vicinity of these lands knew in a general way of the existence and use of the ditch and reservoir. The trial court held that, according to the evidence, no actual trespass had been committed on section 29 in the *construction* of the reservoir; that the trespass, if any, consisted in flooding it after the reservoir on section 30 had been completed; that when the reservoir was constructed, said section 29 was a part of the open range, unfenced, unimproved, unoccupied; that it belonged to the Union Pacific Railway Company, being one of the alternate sections included in its grant from the federal government; that there was no evidence that the railway company had permitted, consented or agreed to the use or occupation of the land for reservoir site, or acquiesced therein, and further found that at no time after the title passed from the railroad company had any owner thereof consented or agreed to or acquiesced in the flooding of said section 29, and on such finding ruled that the original flooding of the land, and each flooding thereafter, was a trespass; that no right can be initiated by trespass, and instructed the jury to find a verdict for plaintiff.

It is contended by counsel for plaintiff in error that the precise question for determination has been settled by the Supreme Court of this state in *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039. The effect of that decision, taken together with *Highline Canal Company v. Moon*, 22 Colo. 560, 45 Pac. 437, is that the act of congress of July 26, 1866, section 9 (14 Stat. at Large, page 253) and its amendment (section 17, act approved July 9, 1870, 16 Stat. at Large, page 218), whether considered as a grant or as a legislative recognition of a pre-existing right, operates as a reservation from the general railroad grants, in favor of irrigation ditches and reser-

voirs used in connection with water rights which become vested under the local customs and laws prior to the issuance of patent. See also *Adams v. Reed*, 11 Utah 480, 40 Pac. 720. Unless precluded by the grant to the railway company as constituted by the acts of congress, approved, respectively, July 1, 1862, July 2, 1864, July 30, 1866, and March 3, 1869, commonly known as the "Pacific Railroad Acts," it is clear that any rights which the owners of the Wadlin reservoir acquired for purposes of storing water on section 29, vested or accrued under the local customs and laws of the state of Colorado, and the decisions of its courts, were and are superior to the title of the plaintiff. Those acts (of which the court takes judicial notice) are pleaded and relied upon by both plaintiff and defendant. Plaintiff contends that said grants by congress to the Pacific railway companies were grants *in praesenti* as of a date not later than approval of the definite location of the line of the Denver Pacific Railway, to-wit, August 20, 1869, which, by relation, becomes the date when the government patent to the land took effect This contention is sustained in *Howell v. Killie*, 17 Colo. 88, 90, 28 Pac. 464, and *U. S. v. U. P. Ry. Co.*, 148 U. S. 562, 570, 17 L. Ed. 560, 563, 13 Sup. Ct. 724. From these decisions and the rule they establish, the conclusion is drawn by plaintiff, and would seem to follow, that after August 20, 1869, this land was not subject to settlement as a part of the public domain, nor to reservations for easements, for any purpose which would interfere with possession, or affect the fee title when vested by patent. However, that conclusion is in direct conflict with the decision in *Tynon v. Despain, supra*. In that case the claim to an easement for an irrigation ditch over several different tracts of land was involved, including a portion of section 25, in the opinion designated as the "railroad tract," and a part of the grant to the Denver Pacific railroad. The court said:

"To the building of the ditch across all of these lands, *except the railroad tract*, the occupying claimants gave their consent in consideration of the benefits which they considered

the ditch for agricultural purposes would be to their holdings. No express consent was given for building across the railroad tract, for it was then unoccupied, * * * and no permission at all as to the railroad tract."

The evidence in that case showed that the ditch was built in the year 1874, five years after the congressional grant became effective by the filing and approval of the map of definite location. The lists of selections of certain tracts under the acts aforesaid, filed by the land agent of the railway company, were made in 1878 and '9, and thereafter patent issued to the railway company and title passed to the defendants against whom the right of way was asserted. In respect to the railroad tract, the facts of that case are precisely parallel to those in the case at bar in every material matter up to the time that the title passed from the United States by its patent to the railway company, so that the rights acquired in the inception of the easements in the respective cases, up to the time of the issuance of patent, are governed by the same rule. The court, in an opinion delivered by Mr. Justice Campbell, said (22 Colo. 249, 43 Pac. 1042):

"It is clear, therefore, that the railway company took its lands subject to the burden of this easement. It is equally apparent that the act of 1866 operated as a grant to the owners of this ditch of a right of way across the lands of an *occupying claimant,* under the United States land laws, when the *inception of the latter's rights accrued under filings made after the passage of the act.* (Italics ours). This right of way for the ditch, it is true, must be compensated for, if its construction injures the *possession* of those on the public domain; but so far as the right to burden the land with a ditch is concerned, by this act of congress the absolute right was granted by the government to build a ditch across it. * * * Under the said acts of congress the grantees of the land, now owned by the defendant, took them subject, by operation of law, to the burden of the right of way for the ditch."

The acts of congress referred to in the opinion are the same acts that are relied upon in the case at bar. The rights of the railroad company did not take effect, even under the grant, until August, 1869, long after the passage of the act of 1866 to which the court refers.

In *High Line Canal Co. v. Moon, supra,* the same rule is announced as in *Tynon v. Despain,* the difference in the facts being that the tract of land there involved was a parcel of "school land" which was given to the state by the national government. Across this parcel of land a ditch was begun in 1873, and thereafter completed and used continuously. There was some question as to whether the grant from the United States to the State of Colorado took effect in 1861 or in 1876. It was contended that the grant made in 1876 was *in praesenti* under the act of 1861, and took effect upon the formation of the state; but the court said:

"Whether the grant from the United States was one *in praesenti,* under the act of 1861, to take effect upon the formation of the state, or was made by virtue of section 7 of the enabling act of March 3, 1876 (1 Mills' An. Stats., p. 92), we need not determine; for in *Broder v. Water Company,* 101 U. S. 274, 25 L. Ed. 790, it was held, in a case somewhat similar to the one at bar, that the act of 1866 referred to 'was rather a voluntary *recognition of a pre-existing right of possession,* constituting a valid claim to its continued use, than the establishment of a new one;' from which it would seem to follow that the petitioner's easement in controversy here was a pre-existing right, antedating the passage of the organic act of the territory, and so protected by the rule in the *Tynon case, supra.*"

Inasmuch as we have concluded that the ruling in the *Tynon* case is directly in point, and decisive of the issues herein made, irrespective of the question of any agreement, consent, acquiescence or waiver alleged by defendant and denied by plaintiff, and that this court should observe the rule *stare decisis* in regard to such issues, we shall not enter into

any original reasoning to support or to overthrow the ruling in that case, but will, by further comparison, show that the cases are parallel, and cannot be distinguished as to any matters upon which the judgment herein can be affirmed. We recognize no distinction between an easement for an irrigating ditch and for an irrigating reservoir. The contention is made by defendant that the ruling in the *Tynon* case, though pertinent, is not controlling, because the court in that case held also that the owner of the railroad tract, after the issuance of patent to the railroad company, acquiesced in and consented to the operation and maintenance of the ditch over that tract, for which reason it is said that the question as to whether the act of building the ditch prior to patent was lawful, or a trespass, was immaterial, and that the ruling of the court upon that question was mere *dicta*. We are unable to give our consent to this contention. The further finding of the court in that case, that, after the issuance of patent, the owner of the land consented to its use by the ditch owner, was an additional and cumulative reason why the easement should be upheld; but it is manifest that that reason was unnecessary as a basis for judgment, after the court had first decided that the entry upon the land for the purpose of making the ditch, and its use thereafter prior to patent, was lawful. Defendant further urges that the *Tynon* case can be distinguished from the case at bar because in that case the physical structure of the ditch was upon the land in dispute, while in this case the physical structure of the reservoir, *i. e.*, the dam, was not upon section 29, although the effect of the dam was to submerge it. This is a distinction without a difference, except upon the question of notice to subsequent purchasers of the existence of the easement. In the case at bar it is clearly shown—and, indeed, admitted—that the plaintiff took his deed with a clause subjecting the title conveyed, to all existing ditch and reservoir rights; that while upon the land, before purchasing, he was advised that a part of the land was or had been occupied as an old

reservoir site, and was told of the reservoir "filings." Prior grantors had taken like deeds, and it is in evidence that at least one of the grantors had known of the existence of this reservoir for from fifteen to eighteen years, and of the adjudication decrees and filings, and that the existence of the reservoir was generally known. The maps and sworn statements of ditch and reservoir provided by statutes in force in 1888 and subsequent thereto were of record, and plaintiff and his grantors had been so advised. This record, we think, operated as constructive notice to the plaintiff of the matters therein shown. It is contended by defendant that under the decision in *Blake v. Boye,* 38 Colo. 55, 88 Pac. 470, 8 L. R. A. (N. S.) 418, and cases there cited, these records do not operate as constructive notice; but it must be observed that such decision was based upon the prior ruling of the Supreme Court in *Lamar Company v. Amity,* 26 Colo. 370, 58 Pac. 600, 77 Am. St. 261, that the statute of 1881, under which the sworn statements were filed, had been declared unconstitutional. That statute was held unconstitutional for the sole reason that the subject matter was not clearly stated in the title of the act. The statute of 1887, under which the filings in this case were made, has not been declared unconstitutional, but has been regarded as in force ever since its enactment. We think that the plaintiff in this case, having had both actual and constructive notice of the existence of the reservoir and of the claims of the owners thereof, or notice of such matters as to put a purchaser on inquiry, will be charged with knowledge of all such facts as he might have acquired had he made due inquiry, which would include the filings and decree, and he cannot now aver that he bought in ignorance of such rights and claims.—*Grand Valley Irr. Co. v. Lesher,* 28 Colo. 273, 289, 65 Pac. 44. He is in no better position than he would have been had the entire physical structure of the reservoir been situated upon section 29. Therefore, the distinction attempted to be made between the *Tynon* case and this case fails.

We have shown that the judgment of the trial court was based primarily upon the finding that the original taking of the land for reservoir site was a trespass, because the land belonged to the Union Pacific Railway Company at that time, and that such finding is opposed to the principle settled in the *Tynon* case. It is also opposed to the ruling in *Roberts v. N. P. R. Co.*, 158 U. S. 1, 39 L. Ed. 873, 15 Sup. Ct. 756, in holding that no right can be initiated by trespass. In the case last cited it was held that where a railroad company *having the power of eminent domain* has entered into actual possession of the land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burden of the railroad, and that the right to payment from the railroad company if it entered by virtue of an agreement to pay, or to damages *if the entry was unauthorized,* belongs to the owner at the time the railroad company took possession; and it was further held that if the land owner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquisced therein, and be restricted to a suit for damages. Of course, if such be the rule as to a railroad company, it is likewise the rule as to an individual having the right of eminent domain and who entered upon the land of a remote grantor of the plaintiff, either with or without authority of law. We think the record very fairly establishes acquiescence and waiver by the acts of plaintiff's grantors, and for that reason he cannot maintain ejectment as to such rights as the defendant and his grantors acquired upon section 29 by the actual use of said lands for reservoir purposes.

Defendant urges that the statute of frauds pleaded by him is of itself sufficient to affirm the judgment. This contention might be available if the right to the easement depended upon an agreement, affecting the real estate, but, as we have shown, the question of such consent or agreement is immaterial, the right being predicated upon and upheld under the act of congress, and not upon any agreement, express or implied.

In support of the judgment, it is also asserted that no easement can be predicated on an intermittent use such as is here shown; but where the right of eminent domain can be successfully invoked, we think the question of intermittent use is not controlling. The use of practically all irrigation works, such as ditches and reservoirs, in this altitude and latitude is necessarily intermittent, as, indeed, is all irrigation, the continuity of which depends on the crops, the season, the rainfall, the relative priority of ditches and reservoirs, etc. But while the use of such works is intermittent, the easement therefor is necessarily continuous, in order to be ready for use when irrigation is required and the supply of water for storage or immediate use is available. We believe it has never been, nor can be successfully, asserted that such intermittent use as is here shown would prevent the taking of land under the eminent domain act for ditches and reservoirs. Indeed, the plaintiff's theory, as shown by his pleadings and briefs, is that the land involved in this case can be so taken if the damages be first fixed and compensation paid. That fact, once conceded, carries with it, we think, the inevitable conclusion that the taking and use, without objection, for such purposes, under the acts of congress, before patent, gives the right to retain possession.

It is seriously urged upon us that this court should not be governed by the *Tynon* case; but the decision of this case turns upon the construction of certain acts of congress which were there construed, and the law as so construed was the law of this state when patent issued. As plaintiff purchased

his land subject to existing ditch and reservoir rights, he loses no rights which he purchased, and we violate no principle of law or equity in abiding by the rule *stare decisis*. It is the established practice of this court, and we believe it proper, to observe that rule in general, and especially where a review may be had in the Supreme Court, which is not restricted by its own decisions as this court necessarily is.

If we felt free to follow our own interpretation of the law, rather than to stand by decided cases, we might easily, and, we think, properly, hold that Wadlin had a right to enter upon the land in dispute and build his reservoir thereon under section 3 of the act of congress of July 1, 1862, (12 Stat. at Large, p. 1492), which provides that "all such lands so granted by this section which shall not be *sold* or *disposed of* by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption like other lands, at a price not exceeding $1.25 per acre, to be paid to said company." There is not a scintilla of evidence in this case to show that section 29 was disposed of by the company until the date of patent—some twenty-eight years after the definite location of the line, perhaps a quarter of a century after the road was completed, and nine years after the reservoir dam was begun; but we have no doubt it could be shown that all the property of the Denver Pacific Railroad Company, including its interest in these lands, was pledged as security for its bonds, and thereafter mortgaged, prior to the initiation of the reservoir. In *Platt v. U. P. R. R. Co.*, 99 U. S. 48, 25 L. R. A. 424, it was held that such mortgage constituted a disposal of the land, within the meaning of the act. Following our own reason in interpreting the act, we would agree with the dissenting opinion of Mr. Justice Bradley, concurred in by Justices Clifford and Miller, which holds that by the mortgage the lands were not "disposed of" within the contemplation of the act, and were therefore subject to settlement, conditioned only upon the payment of $1.25 per acre to the railroad company;

but that point is decided, and we stand by that decision, as we do by the *Tynon* case.

We are unwilling to conclude this opinion without expressing our conviction that the principle announced in the *Tynon* case by which that decision, as to the "railroad tract," is governed, is sound. The right to occupy land on the public domain before patent, when necessary for ditches and reservoirs incident to the acquisition and use of water for irrigation, has its roots deep in the natural conditions which exist in the arid regions. It springs from the necessity for irrigation, without which the land must remain barren and practically uninhabitable, but with which it is made to fructify and provide abundant sustenance for multitudes to whom it may then offer a home and abiding place. Because of this necessity, the courts have wisely held that the right to these easements always existed, and therefore was pre-existent to the acts of congress which seemed to grant, but which in fact only recognized and confirmed it, and that it was not taken away by those other acts of congress by which vast areas of public domain were granted by wholesale gift to railroad corporations in aid of the construction of their railroads, but although not exercised until after the railroad grants had attached, remained unimpaired, except as to payment of damages to possessory rights, at least until by the issuance of patent prior to occupation of such lands by the owner of water rights for irrigation, the acquisition of easements therefor became subject to state laws only. "Primarily, where the climatic conditions are such as exist in Colorado, the right to convey water for irrigation purposes over land owned by another is founded on the imperious laws of nature, with reference to which it must be presumed the government parts with its title."—Chief Justice Thatcher, in *Schilling v. Rominger,* 4 Colo. 100, 109; *Yunker v. Nichols,* 1 Colo. 551; *DeGraffenried v. Savage,* 9 Colo. App. 131, 47 Pac. 902. Nor do we wish to be understood as blindly following decided cases. Following precedent, when established by well con-

sidered decisions of our courts of last resort, is not an abandonment of principle, but rather an adherence thereto; an application of accepted principles to the facts under consideration, to the end that justice under the law may be a more certain measure of man's rights, and that its standard may be known, or, at least, knowable.

For the reasons given, the judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

We will not undertake to determine, nor suggest, the area of said section 29 which is properly subject to use by the defendant for reservoir purposes, further than to say that it cannot be extended beyond the limit of actual use as shown by the evidence, and should be restricted to the smallest area consistent with practical use of the reservoir, having in view the intermittent supply of water and the right of the owner of the servient estate to have the fullest possible use of his lands.

Reversed and Remanded.

Decided November 9, A. D. 1914. Rehearing denied December 14, A. D. 1914.

[No. 4007.]

ROCKY MOUNTAIN FUEL COMPANY v. KOVAICS ET AL.

1. PLEADINGS—*Construed.* Parents brought their action for negligence causing the death of their son, alleging that "the plaintiffs—mother and father," etc. *Held* mere recital of the relationship, and not an averment thereof. (555)

An action against the master for the death of a servant, the complaint attributing the death to a neglect made actionable by a particular statute, must be held to be founded upon such statute. (558)

2. —— *Defective Allegations,* e. g. by way of recital should be assailed by motion to make more specific; otherwise the objection is waived. (555)

An objection to the evidence offered to establish matter merely recited, upon the ground that the complaint does not state a cause of action, is equivalent to a general demurrer, and is properly overruled. (555)

3. PARENT AND CHILD—*Parent's Action for Death of Child.* The phrase "lineal heirs," in Rev. Stat., sec. 649, is to be construed by reference to the law of descent, in force at the date of that enactment (Rev. Stat., sec. 7040), and other statutes *in pari materia* (Rev. Stat., sec. 2056); Hendry v. Holt, 24 Colo. 464, distinguished. (556-558)

4. CONTRIBUTORY NEGLIGENCE—*For the Jury,* where the evidence is such that a jury of intelligent, upright and reasonable men, may honestly exonerate the one whose conduct is in question. (559)

Error to Denver District Court. HON. GEORGE W. ALLEN, Judge.

MR. EDMUND J. CHURCHILL, MR. JESSE G. NORTHCUTT, MR. J. V. SICKMAN and MR. HARRY S. SILVERSTEIN for plaintiff in error.

MR. L. J. STARK for defendants in error.

MORGAN, J.

Writ of error by the defendant in the lower court from a judgment against it for $700 in an action for damages claimed on account of the death of the plaintiffs' son who was killed in defendant's coal mine by the falling of a large rock from the roof of the room in which the son and his father were at work mining coal.

The numerous assignments of error are within the scope of three propositions of law discussed in the briefs: (1), the

insufficiency of the allegation that the plaintiffs are the father and mother of the deceased; (2), the right of the father and mother to sue, and (3), the right of a recovery at all on the merits under the evidence.

First. It is not good pleading to allege by way of recital a material fact. The complaint alleges the relationship as follows: "The plaintiffs in this cause, Antone and Kate Kovaics, mother and father of said Andrew Kovaics, are his sole heirs at law." The words "mother and father of said Andrew Kovaics," inserted merely in apposition with the names of the plaintiffs, is a mere recital and is not a positive, affirmative allegation that the plaintiffs are the father and mother, and the allegation, therefore, is defective. *Leadville Water Co. v. Leadville,* 22 Colo. 227, 45 Pac. 362; Bliss on Code Pleading, 3rd or 4th Ed., sec. 318; Pomeroy's Code Remedies, 2nd or 3rd Ed., secs. 549, 597, and cases cited. This is a technical objection, however, and the defect should have been attacked by a motion to make more specific. Pomeroy's Code Remedies, *supra.* No such motion was interposed and the defect was thereby waived, and should receive no consideration here. "This court will never encourage a practice that will tolerate concealment of objections in trial courts for the purpose of overthrowing the judgments of such courts upon review." *Black v. Bent,* 20 Colo. 342, 344, 38 Pac. 387, 388.

Furthermore, the relationship was treated as an issue in the case throughout the trial and in the instructions without specific objection. It is true an objection was made when the plaintiff offered to prove the relationship that such proof was irrelevant to the issues as made, and later on, the complaint was attacked on the ground that it did not state a cause of action. This was equivalent to a general demurrer to the complaint and it was properly overruled. The complaint stated a cause of action as against a general demurrer, but in a defective manner as against a motion to make more specific. Pomeroy's Code Rem., *supra,* and cases cited. This defect in

the complaint and the objection thereto is hardly worthy of consideration, but page after page has been written by the authors on code pleading and by the courts in the opinions concerning the same; the majority of which, however, reach the conclusion that the defect is one of form as distinguished from one of material matter, and if not taken advantage of by a motion to make more specific, instead of by a general demurrer or objection to the evidence on the ground that the complaint does not state a cause of action, it is waived. Mills' Ann. Code, pp. 197, 198.

Second. It is then contended that the father and mother have no right of action for the death of the son on account of the provision in the coal mining act that a right of action "shall accrue to the widow and the lineal heirs of the person whose life is lost." Sec. 649, Rev. St. 1908.

It is true that, under the common law of descent, following the feudal system, the father and mother and all persons in the ascending line could not inherit. Cooley's Blackstone, 4th ed., 601-04, but even in England this rule was altered, by the statutes of 3 and 4 Wm. IV, Ch. 106. (Cooley's Blackstone, *supra,* p. 624), so that "the nearest lineal ancestor, or his issue," could inherit "on failure of issue of the last purchaser." So in the United States, similar changes have been made but with no definite uniformity. In this state it has been enacted, sec. 7040, R. S. 1908, that the father and mother may inherit if there be no children nor their descendants. The statute thus defining the word "heir" as including the father and mother, was in force at the time the coal mining act was passed. A lineal heir is one who inherits in line either ascending or descending from the common source as distinguished from a collateral heir. Cooley's Blackstone, *supra,* 598; Bouvier's Law Dictionary, "Consanguinity;" *Beard v. Skeldon,* 113 Ill. 584; *Willis Coal and Mining Co. v. Grissell,* 198 Ill. 313, 65 N. E. 74. The legislature must have used the words "lineal heirs" in the coal mining act according to the commonly accepted use of such words and in accordance with the

existing law in regard to descents, sec. 7040, *supra,* and also according to sec. 2056, R. S. 1908, the general damage act, in which the father and mother are specifically authorized to sue for the death of the child; although, as to the latter act, it has been held that "heir or heirs" as used therein means "child or children." *Hendry v. Holt, infra.* To hold that the term, "lineal heirs," excludes the father and mother, would compel the adoption of the rule under the feudal system at common law as well as the non-observance of the common use of the words and the statute of the state in reference to descents.

Counsel rely upon *Hendry v. Holt,* 24 Colo. 464, 51 Pac. 1002, 39 L. R. A. 351, 65 Am. St. 235, in support of their contention that the father and mother are not "lineal heirs," as that term is used in the coal mining act, because in that case, in construing the general damage act, sec. 2056 R. S. 1908, it is held that "heir or heirs," as used in that statute, means "child or children." In that case the action was brought by a niece on account of the death of her uncle, she being his only heir, and the court held that "heir or heirs" would not include collateral kindred such as niece, and that, in order to give full force to the entire act it was necessary to construe the words, "heir or heirs," to mean "child or children," and thus carry out the purposes of the act. Such construction was furthermore, more or less, compelled by the third provesion of that act which would be useless if "heir or heirs" included the father and mother. But in the coal mining act the right of action is specifically limited to the lineal heirs, and to the widow, with no further extension or limitation, and this act, standing alone as it does, leaves the scope of interpretation and construction so narrow that the meaning of the words, "lineal heirs," is alone necessary to be considered in arriving at the persons entitled to a right of action; or particularly, the question is, do the words, "lineal heirs," include the father and mother? It seems that the legislature by inserting the word "lineal" before the word "heirs"

for the first time in the statutes of this state intended thereby to exclude collateral heirs, only, and thus preserve the same purpose in the coal mining act as in the general damage act, that is, to give the right of action to those who were entitled to receive the benefits of the person killed, while he lived, to enable them to recover damages for the loss of such benefits in case of his death. To exclude the father and mother would be to give a different meaning to the term "lineal heirs" than the commonly accepted one, and different from the statute of descents, as well as to deprive the father and mother of a right of action under the coal mining act, which was enacted for the same humane purpose as the general damage act. The *Henry v. Holt* case is not contrary to this conclusion but to some extent in support of it.

The other cases relied upon by counsel are not controlling here and may be distinguished by reason of the terms of the statute involved, the point that was decided, or as *obiter* statements. I shall not attempt to discuss them but will only cite them: *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232, 56 S. W. 1091; *Bowerman v. Lackawanna Co.*, 98 Mo. App. 308, 71 S. W. 1062; *Hackett v. Louisville Co.*, 95 Ky. 236, 24 S. W. 871; *Howard's Administrator v. Hunter*, 126 Ky. 685, 104 S. W. 723; *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Manning v. Tacoma R. R. Co.*, 34 Wash. 406, 75 Pac. 994; *Rochester v. Seattle R. & S. R. Co.*, 67 Wash. 545, 122 Pac. 23, 39 L. R. A. (N. S.) 1156.

Opposing counsel further contend that the action in this case was brought under the general damage act as well as under the coal mining act, and that the plaintiffs could recover under the former act even though they were not entitled to recover under the latter. It is concluded, however, that, as the gist of this action is the alleged negligence of the defendant in *not furnishing props*, the action must be held to have been brought under the coal mining act as this is the only act that specifically gives a right of action for negligence in failing to furnish props.

Third. The next contention is that the court erred in submitting the question of contributory negligence to the jury notwithstanding the motions for a non-suit and for a directed verdict.

The evidence, on this question, was such that there was room for a substantial difference of opinion among intelligent, upright and reasonable men, and was not so conclusive against the plaintiffs that this court will say it was error to submit the question to the jury or that the verdict was contrary to the evidence. The action is based upon the negligence of the company in failing to furnish props, under the coal mining act. Secs. 641 and 649 R. S. 1908. The verdict of the jury on conflicting testimony settled the question of negligence, in failing to furnish props, against the company, and also the question of contributory negligence, provided it was proper for the lower court to submit the latter question under the evidence. In the case of *Victor Coal Co. v. Muir,* 20 Colo. 320, 341, 38 Pac. 378, 386, 26 L. R. A. 435, 46 Am. St. 299, the Supreme Court states the rule governing this question in the following language:

"But where a miner knowingly and voluntarily exposes himself to the falling of a defective roof which he has inspected, and found so defective that a miner of common prudence should deem it unsafe, his negligence is to be held wilful and sufficient to preclude his recovery for an injury brought upon himself for such exposure."

In that case the Supreme Court used the foregoing language in holding that the plaintiff, Muir, was guilty of contributory negligence, as a matter of law, reversing the judgment of the lower court entered on a verdict, and holding that the lower court should have directed a verdict for the defendant. The evidence in that case is substantially the same as in this, with slight difference, however, and, after a careful examination of the evidence herein, this court is unable to say that a jury of intelligent, upright and reasonable men might not honestly arrive at the verdict returned in this case. It

does not appear that either the son or the father, who were working together, knew the actual condition of the roof and the rock that fell, to the extent that Muir knew of the actual condition of the rock that fell upon him.

For the foregoing reasons the judgment of the lower court is affirmed.

Decided November 9, A. D. 1914. Rehearing denied December 14, A. D. 1914.

[No. 4017.]

RITTER V. IDLER.

1. EVIDENCE—*Declarations—Non-Judicial*, are not evidence against a third person who was not present. (561)

2. DECEIT—*Who Liable*. Misrepresentations by one who contracts in his own name for the sale of the lands of another do not charge the owner of the land unless the vendor is shown to have been the agent of such owner. (561)

3. PRINCIPAL AND AGENT—*Evidence of Agency*. It seems that the mere fact that the owner of land executes a conveyance thereof, pursuant to the contract of another, is not even *prima facie* evidence that the vendor was agent of the land owner. (561)

Error to Bent District Court. HON. HENRY HUNTER, Judge.

MR. GRANBY HILLYER for plaintiff in error.

MR. C. C. GOODALE, MR. H. L. LUBERS for defendant in error.

CUNNINGHAM, P. J., rendered the opinion of the court.

The controversy in this case arose over the sale to the plaintiff in error Ritter of 160 acres of land in Bent County. Idler was the owner of record of the land. The sale to Ritter, who was the plaintiff below, was negotiated by D. H. Bane, apparently acting for a real estate agency or a company known as D. H. Bane & Co. Plaintiff Ritter brought his action against Idler to recover damages against the latter for alleged false representations made to him, Ritter, by Bane, concern-

ing the water rights incident to the land in question, and concerning the amount of the land that could be irrigated. Here was no contention made on behalf of plaintiff that the defendant Idler made any representations whatever to Ritter concerning the land, prior to the time Ritter had entered into a written agreement with Bane to purchase the same; hence the plaintiff can recover from Idler only upon the theory that Bane was the latter's agent.

At the conclusion of plaintiff's case the trial judge instructed the jury to render a verdict in behalf of the defendant, apparently upon the ground that plaintiff had failed to introduce evidence of Bane's agency sufficient to take the case to the jury on that point. We have examined the original record with care and are satisfied that the trial court's conclusion was correct. The only evidence tending to show that Bane in selling the land to Ritter acted as the agent of Idler is found in the fact that the record title to the land stood in Idler and he executed the deed to Ritter. The written contract of purchase and sale which was introduced in evidence was between D. H. Bane & Co. and Ritter alone. Bane himself was not called to the stand by the plaintiff, and his declaration said to have been made out of court to Ritter that Idler owned the land was not competent evidence to prove agency.

Having reached the conclusion that the trial court was right in ruling that there was no competent evidence to establish Bane's agency, it is unnecessary to consider whether in the sale of the land Bane made false representations, or whether if he made false representations the same were of a character that would support an action for damages.

The judgment of the trial court is affirmed.

MORGAN, J., dissenting.

[No. 4018.]

TEMPEL V. IDLER.

1. PARTIES—*Plaintiffs.* Action for deceit in the sale of land. Plaintiff produced a contract executed by defendant to him, plaintiff, alone, and a conveyance by the land owner to plaintiff and his wife. On motion to dismiss for nonjoinder of the wife, plaintiff offered to show that he contracted for himself alone, that he alone paid the consideration money, that the wife was not present when the alleged false representations were made, and that they were never communicated to her. *Held* that the wife had no right of action, and to allow the motion was error. (563)

2. PRINCIPAL AND AGENT—*Principal Liable for Frauds of Agent.* It seems that one who employs another to sell land may be liable for material misrepresentations of the agent inducing the purchase. (563)

Error to Bent District Court. HON. HENRY HUNTER, Judge.

MR. GRANBY HILLYER, MR. C. E. SNYDER for plaintiff in error.

MR. C. C. GOODALE, MR H. L. LUBERS for defendant in error.

Per Curiam.

This case is similar to No. 4017, *Ritter v. Idler,* decided by us at this term, but the trial court dismissed this case at plaintiff's cost upon other grounds than those which controlled in No. 4017. In the present case the court dismissed the complaint before any opportunity had been given to the plaintiff Tempel to prove the agency of Bane. The contract in the instant case was between Bane and Tempel, and was substantially the same as the contract in No. 4017, except that Ritter was the vendee in that case while Tempel is the vendee in the presnt case. On the trial plaintiff Tempel, after introducing the contract between himself and Bane, introduced a warranty deed running from Idler to himself and his wife jointly. Upon the introduction of this deed the defendant objected to the introduction of further testimony on the part of the plaintiff, and asked that the case be dismissed on the ground of non-joinder of parties plaintiff. It seems to have been the view of the trial judge that simply because the deed ran to Tempel and his wife jointly therefore the wife was an indispensable party plaintiff. In this we are persuaded the

trial court erred. The wife was not a party to the written contract of purchase and sale. That was between Bane and Tempel alone. The plaintiff offered to prove that he was the only party in interest in the preliminary contract of purchase and sale; that he had paid the entire consideration for the purchase price of the property; that he did not act as the agent for his wife in the purchase of the land; that his wife was not present when the alleged false representations concerning the water rights and land were made; that said representations were never made or communicated to her, and that "she was and is ignorant of all of said representations." This offer of proof was refused. If he could have proven these facts, then clearly Mrs. Tempel never did have any right of action against Bane or against his principal Idler (if it be conceded that Bane was Idler's agent), based on false representations.—*Tyson v. Rainey,* 89 Wis. 518, 61 N. W. 563, 62 N. W. Rep. 931.

Notwithstanding the fact that the plaintiff in *Ritter v. Idler,* No. 4017, (the opinion in which we have just handed down), failed to prove that Bane was Idler's agent, it does not follow that in the present case such agency might not have been established by competent proof. Indeed, in the present case the record shows that the plaintiff offered to prove by the witness Bane that in said transaction he, Bane, acted as the agent of defendant Idler; that said property had been listed for sale by the said defendant with Bane as agent; and that Bane was paid a commission by the defendant Idler for the sale of the property referred to herein. This was competent evidence to establish the agency of Bane.—*Wales v. Mower,* 44 Colo. 146, at p. 151 *et seq.,* 96 Pac. 971

As we pointed out in the Ritter case, no such proof was offered on the trial of that case.

For the reasons given the judgment of the trial court is reversed and the case is remanded for further proceedings in conformity with the views herein expressed.

Reversed and Remanded.

[No. 4084.]

FORD V. SWEET ET AL.

TRIAL—*Failure of Proof.* Where the action is founded upon allegations of fraud which are controverted by defendant and the plaintiff entirely fails in his proofs, judgment for the defendant follows as of course. (566)

Error to Denver District Court. HON. H. P. BURKE, Judge.

MR. JOHN P. BROCKWAY for plaintiff in error.

MESSRS. PERSHING & TITSWORTH and MR. JOHN H. FRY for Wm. E. Sweet & Company.

HURLBUT, J., rendered the opinion of the court.

This action was instituted by plaintiff in error (plaintiff below), seeking thereby to annul certain contracts with Sweet & Company, one of the defendants, and to enjoin that company from securing, selling or attempting to sell water bonds of the town of Dolores, and from interfering with Ford's sale and negotiation thereof.

The pleadings are somewhat voluminous, but it is easy to ascertain therefrom that plaintiff's principal object in bringing the action was to prevent Sweet & Company from purchasing or obtaining possession of about $7,000 of the water-works bonds of said town, which bonds were the last of a $45,000 issue. The action is entirely of an equitable nature, and no money judgment is asked for against any of the parties to the action, nor is any accounting prayed for. The prayer of the complaint is for equitable relief only.

The pleadings and proofs fairly show the following facts: That on or about August 12, 1911, plaintiff Ford and the defendant Sethman entered into a contract in writing with the town of Dolores, to construct and complete a water-works system, at the agreed price of $45,000, payment of same to be made with 6% water bonds of the city; that, afterwards and on or about December 6, 1912, said Sethman and Ford entered into a contract with one William Dempsey, by the

terms of which said Dempsey agreed to complete the water-works system, and to provide the necessary means to do so; that by the terms of such contract Dempsey was appointed the agent of Sethman and Ford, to complete the construction of the water-works system; that on July 17, 1912, defendant Sweet & Company wrote a letter to Sethman offering to purchase $17,500 of the said water-works bonds, which were dated August 15, 1911, at a price therein specified, also reciting that there was to be no liability on their part to pay for the last $5,000 of such bonds until after the water-works system should have been formally accepted by the town, by and through a proper resolution passed to that effect, which proposition was accepted in writing by Sethman; that on September 3, 1912, said Sweet & Company wrote another letter to said Sethman, offering to purchase $12,000 of such bonds, at a price therein stated, which letter contained a condition similar to the one incorporated in the letter of July 17th, above mentioned, this offer being also accepted by Sethman; that Ford well knew of Sweet & Company's offer to buy the bonds, and that Sethman had accepted the offer, and Ford gave his consent, although he denies that he knew or understood the terms as construed and understood by Sethman and Sweet & Company; and that, before this action was brought, Sweet & Company showed the letters of July 17th and September 3rd to plaintiff's attorney.

The foregoing statement of facts is sufficient for a fair understanding of the case as presented by the record. Ford attempts to avoid his consent to the sale of bonds to Sweet & Company under the terms of their letters, by charging them with fraud and collusion with Sethman to obtain the bonds at a less price than they were really worth, and that Sethman deceived him in regard to the amount which Sweet & Company were to pay for the bonds. It seems that *Sethman* did not show the two letters to Ford, but stated to him the fact of the sale and the substance of their contents. Ford also attempts to support the action by pleading and attempting to

show that Sethman was not loyal to him as a partner, and that he attempted to profit personally by the contract with Sweet & Company in the sale of the bonds, to the exclusion of his partner Ford. Sethman refused to be a party plaintiff, and was made a defendant under the practice sanctioned by the code. The trial court excluded (and properly we think) about all the evidence tendered by Ford. The latter failed wholly to prove any fraud whatever against Sweet & Company, and he equally failed to prove the fraud which he had pleaded against his partner Sethman. These issues of fraud were sharply defined, and are controlling in determining the controversy between the parties. The failure on the part of plaintiff to prove the fraud charge left him without ground for relief, and judgment for defendants would necessarily follow. At the close of plaintiff's testimony each of the defendants moved for a dismissal, which was granted. The record contains copies of many letters written by Ford or his attorney to Sweet & Company, the general purport of which was to obtain from them a written statement of all their dealings with Sethman, relative to their offers, and purchase of bonds, and copies of all correspondence between them and Sethman concerning the same; also a written statement as to what claims, if any, said Sweet & Company had against him, and wherein they claimed he was obligated to sell and deliver to them any of such bonds; and copies of all documents and book accounts affecting the transaction; all of which letters Sweet & Company ignored, except that they furnished copies of the two letters aforesaid, and offered to show certain of their books, or allow inspection thereof, claiming that they had their dealings with Sethman and were under no obligations to further comply with Ford's demands.

We might say at this time that if any doubt whatever exists as to Ford giving his consent to Sethman's acceptance of the offers of Sweet & Company, contained in their letters of July 17th and September 3rd, it is entirely dispelled by a

paragraph found in the Dempsey contract, which reads as follows:

"It is understood by and between the parties hereto that Sethman and Ford have made a binding contract with Sweet & Company of Denver, by which they are obligated to deliver to the said Sweet & Company the balance of the bonds to be received from the town of Dolores upon the said contract above mentioned."

This contract was signed by Dempsey, and by Sethman and Ford, individually. We entertain no doubt, upon consideration of the entire record, that the judgment rendered was right, and should not be disturbed.

There are some other questions raised in the assignments of error, but inasmuch as such assigned errors are based upon plaintiff's theory of the case, which is opposed to that entertained by this court, we see no good purpose to be accomplished by entering into a detailed discussion of such rulings.

We discover no error in the proceedings in the trial court, and the judgment will be affirmed.

Judgment Affirmed

Decided November 9, A. D. 1914. Rehearing denied December 14, A. D. 1914.

[No. 4100.]

UNION PACIFIC RAILROAD COMPANY v. WOLFE, JUSTICE OF THE PEACE, ET AL.

1. CERTIORARI—*Nature and Scope of the Writ.* The certiorari allowed by Rev. Stat., secs. 3837 *et seq.*, is for the purpose of procuring a trial *de novo*, in the District or County Court, of a cause previously tried before a Justice of the Peace. It is a mere substitute for an appeal, and the party pursuing this remedy waives all question as to the jurisdiction over the person. (570)

Otherwise as to a defect of jurisdiction of the subject matter. (570)

The purpose of the certiorari allowed by the code (Rev. Code. sec. 331) is to review the action of an inferior tribunal, board, or officer, who, in exercising judicial functions, has exceeded the jurisdiction or grossly abused the discretion which the law reposes in such tribunal or

officer, and no appeal is allowed, nor, in the judgment of the court, any plain, speedy and adequate remedy. (569, 570)

Judgment had been entered against the plaintiff in error in the court of a Justice, without any lawful service of process. *Held* that certiorari under the code was proper; that inasmuch as an appeal, or certiorari under Rev. Stat., sec. 3837, would have constrained the plaintiff in error to a waiver of its right to a lawful service of process, such appeal or statutory certiorari was not an adequate remedy. (574)

Held, further, that the possible remedy by injunction was no bar to the remedy by certiorari. (574)

2. INJUNCTION—*To Stay Execution of Void Judgment.* Doubted whether the writ will be awarded where there is an appeal, writ of error or certiorari. (575)

Error to Denver District Court. HON. JOHN A. PERRY, Judge.

MESSRS. HUGHES & DORSEY for plaintiff in error.

MR. W. W. HUNT for defendants in error.

KING, J., delivered the opinion of the court.

In a suit entitled *Spencer v. Smarsty*, pending in the Justice of the Peace Court, a writ of attachment against Smarsty was delivered to the constable for service. In aid of this attachment, the constable issued a garnishee summons directed to The Union Pacific Railroad Company, plaintiff in error, and attempted to serve it by reading it to, and leaving a copy with, an employe of said railroad company who was not an officer or agent of said corporation upon whom it was competent to make service, and thereupon returned the summons as so served upon the corporation. The company made no answer concerning its indebtedness to the defendant in the attachment suit, but entered its special appearance in the Justice Court, and moved to quash the service of the garnishee summons, because the pretended service was not lawful. This motion was denied, and thereafter, on the 18th day of November, 1912, default judgment was rendered against the garnishee in favor of said Spencer. November 30th the company filed in the District Court its petition for writ of certiorari to remove the said cause to the District Court. The

writ was accordingly issued and served. Motion was made to quash the writ and dismiss the cause, assigning, as reasons therefor, that the petition did not state facts sufficient to support the writ; did not state the facts required by the statute to be stated, and did not show that it was not in the power of the petitioner to take an appeal in the ordinary way. The motion was sustained, the writ quashed, and *procedendo* to the Justice Court ordered, from which judgment, writ of error was sued out.

The District Court held that service had not been made upon the railroad company, therefore the judgment was void for want of jurisdiction; that from said judgment the garnishee had the right to appeal to the County Court, but by thus appealing it would have waived the jurisdiction of the justice over its person. With such ruling there seems to be no controversy; but the court further held that the garnishee could obtain no relief for want of jurisdiction under writ of certiorari, because that writ would not issue to review a judgment in any case where there is an appeal, and that if the garnishee desired to contest the jurisdiction of the justice over its person, it could do so by applying for an injunction restraining the enforcement of the judgment. This ruling is assigned as error.

In this state, there are two proceedings by writ of certiorari: One is provided for in section 297 Mills' Ann. Code, section 331 Code of 1908, which we will call the code remedy; the other is provided for by general statute—Mills' Ann. Stats. 1912, section 4402, *et seq.*, R. S. 1908, section 3837 *et seq.*, and will be called the statutory remedy. The code remedy is for the purpose of reviewing the action of any inferior tribunal, board or officer exercising judicial functions, for excess of jurisdiction, or gross abuse of discretion, where there is no appeal, or, in the judgment of the court, any plain, speedy and adequate remedy. The statutory remedy is for the purpose of securing a trial *de novo* of causes previously heard by justices of the peace, where, without fault on his

part, the petitioner is unable to take his appeal in the ordinary way.—*Small v. Bischelberger,* 7 Colo. 563, 4 Pac. 1195; *Axelson v. People,* 45 Colo. 285, 101 Pac. 54. It is important to bear in mind the distinction between these two procedures, and the remedy which they afford, for there is a clear line of demarkation which is decisive of this case. Under the code, the writ may be granted by any court of record to any inferior tribunal, *including justices of the peace,* but only for the purpose of reviewing the judgment upon the question of want or excess of jurisdiction (or gross abuse of discretion); the merits of the case are not in issue; the inquiry is limited to whether the court below exceeded its jurisdiction or greatly abused its discretion.—*People ex rel. v. District Court,* 22 Colo. 422, 425, 45 Pac. 402; *People ex rel. v. Board of Commissioners,* 27 Colo. 86, 89, 59 Pac. 733; *People ex rel. v. Court of Appeals,* 32 Colo. 147, 75 Pac. 407. To all practical intents and purposes, this writ is the same as the common law writ.—*Ellis v. People,* 15 Colo. App. 341, 62 Pac. 232; *State Board v. Carpenter,* 16 Colo. App. 436, 66 Pac. 165. The statutory writ may be issued by judges of the District and County Courts, but only to remove causes from before Justices of the Peace. Its purpose is to bring the case up for trial *de novo* upon the merits. It is a mere substitute for an appeal.—*State v. Harcourt,* 38 Colo. 243, 247, 88 Pac. 255—and is granted only when, for some reason, it is not within the power of the party to take an appeal in the ordinary way; and upon a petition showing that the judgment before the justice was not the result of applicant's negligence; that the judgment, in his opinion, was erroneous and unjust, wherein such error and injustice consists, and the particular circumstances which prevented applicant from taking an appeal in the ordinary way. It provides no remedy for excess of jurisdiction or want of jurisdiction of the person. By special statutory provision—section 4410 M. A. S., 3854 R. S. '08—the question of the jurisdiction of the person is waived by taking an appeal.—*Dietz v. City of Central,* 1 Colo. 323, 330;

Craig v. Smith, 10 Colo. 220, 15 Pac. 337; *U. P. Ry. Co. v. DeBusk,* 12 Colo. 294, 296, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. 221. It is also provided in the statutory proceedings for certiorari that upon the return of the writ which brings the case up for trial *de novo* "such proceedings shall be had thereon as in case of appeals." The writ then becomes *functus officio.—State v. Harcourt, supra.* It is therefore manifest that upon trial under the statutory writ, the proceedings being the same as in the case of appeal, and a mere substitution therefor, the question of jurisdiction of the person is waived. —*Pickering v. Palmer,* (N. M.) 138 Pac. 198, 50 L. R. A. (N. S.) 1055.

Defendants in error contend that, as to judgments of the Justice of the Peace, the statutory remedy is exclusive, but that, inasmuch as an appeal could have been taken from the justice of the peace in the ordinary way, certiorari would not lie under either procedure. With this contention we do not agree, under the facts alleged. The code provision is:

"The writ shall be granted in all cases where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or greatly abused the discretion of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy."

This provision of the code has been construed in *People ex rel. L'Abbe v. District Court,* 26 Colo. 386, 396, 58 Pac. 604, 607, 46 L. R. A. 850, and in *Paul v. Rooks,* 16 Colo. App. 44, 47, 63 Pac. 711. In the former case the court said:

"The mere fact that an appeal lies to a final judgment is not conclusive against the right to issue the writ. Notwithstanding that fact, it may be granted, if, in the judgment of the court, *the remedy by appeal* is not plain, speedy and adequate. An appeal is not always, and in all circumstances, adequate. The code does not mean that the writ shall not issue except when two contingencies combine, of an absence of appeal and inadequate remedy. The language is, 'No ap-

peal, *nor* plain, speedy and adequate remedy.' This means if, in addition to the lack of jurisdiction, either element, the absence of an appeal or inadequacy, etc., of remedy, is present, the writ of prohibition may go."

In *Paul v. Rooks, supra,* the court had under consideration the effect of an appeal from a judgment in the Justice Court. As shown by the abstract and briefs, the appellant insisted that appellee's only remedy in the County Court was by certiorari, to which contention the appellee, in argument, said:

"An examination of the code section 297 discloses that it is only where there is no appeal that certiorari will lie to test the question of jurisdiction."

In answer to this, the court, by Wilson, J., at page 48 [63 Pac. 712] said:

"We do not feel called upon to suggest what remedy defendant could have had, other than by appeal, but will say that his construction of code section 297 is not in accord with the decision of the Supreme Court. *People ex rel. L'Abbe v. District Court,* 26 Colo. 396. It has been there held that the mere fact that an appeal lies to a final judgment is not conclusive against the right to issue a writ of certiorari. 'Notwithstanding that fact, it may be granted, if in the judgment of the court the remedy is not plain, speedy and adequate.' "

From these decisions, it is plain that if the remedy by appeal is inadequate, it is no remedy, and gives to a court of record under the code proceeding the same right, and imposes upon it the same duty, to grant writ of certiorari as if no right of appeal existed; and with this in view, the holding of the Supreme Court in *Van Buren v. Posteraro,* 45 Colo. 588, 593, is clearly in point. In that case the appellee urged that, inasmuch as the action of the justice of the peace was void, injunction (which remedy she sought) was her only remedy, but the court said:

"If the justice exceeded his authority, and the matter could not have been taken to a higher court under § 2679 or

§ 2692 Mills' Ann. Stats., appellee nevertheless had a clear and proper remedy under chap. 28, Mills' Ann. Code; *Leloff v. Heath,* 31 Colo. 170, 172." [71 Pac. 1112, 1113.]

Section 2679 provides for an appeal, and section 2692 is the statutory provision for writ of certiorari which we have been discussing. If, as we have decided, inadequacy of remedy by appeal, or its substitute, the statutory writ of certiorari, is the legal equivalent of the absence of a right to appeal, then the decision just cited is a clear holding that the code remedy (section 297 Mills', being a part of chapter 28) is applicable to proceedings before justice of the peace, under certain conditions, and that the statutory remedy is not exclusive. In *Leloff v. Heath, supra,* it was held that the statutory procedure is not exclusive, where no remedy is provided by statute.

In support of his contention that the statutory remedy is exclusive, counsel for defendants in error cites *Wood v. Lake,* 3 Colo. App. 284, 33 Pac. 80. The court there held that the code provisions respecting writ of certiorari were not applicable; that wherever, as in that case, the act regulating the jurisdiction of the justice of the peace *provides remedies* when the litigant's rights are not respected by the magistrate, those remedies must be taken to be exclusive, and the petition did not make the allegations required by the statute, and therefore dismissed the writ. We may readily agree with Judge Bissell in his application of the law to the facts before him. There was no question that the justice had full jurisdiction of the subject matter and of the person of the defendant. The judgment rendered by the justice of the peace was not void; it was one from which appeal would lie, and in which every question at issue could be raised without waiver upon appeal—that is to say, would have afforded an adequate remedy. Under those facts, the act regulating the jurisdiction of the justice of the peace might well be regarded as exclusive. Defendants in error also cite *Holmboe v. Hermond,* 52 Colo. 316, 121 Pac. 154, in which the court held that certiorari would

not lie to review the judgment of the justice of the peace, because there was nothing to prevent him from taking an appeal. But, as is stated in the opinion, and more fully disclosed by an examination of the abstract and briefs, that proceeding was under the statute, and asked for a trial *de novo*. We think it safe to say that there is no decision of the courts of review in this state which holds that the code provisions are not applicable for the purpose of reviewing judgments rendered by justices of the peace where questions of jurisdiction only are to be reviewed, and where an appeal affords no redress for excess of jurisdiction. It is different, of course, where the jurisdictional question raised is of the *subject matter,* which is not waived by the ordinary appeal.

The defendants in error contend that the petition was not sufficient. It states facts from which it appears that the justice of the peace had exceeded his jurisdiction, or was without jurisdiction; that there was no adequate remedy by appeal, and no plain, speedy and adequate remedy at law, except certiorari. We think such showing was sufficient. It was said that plaintiff in error had a remedy by injunction. Conceding, for the sake of argument, that there was a possible remedy by injunction, nevertheless, we think that would not deprive plaintiff in error of the right to proceed by certiorari. It is a recognized principle that the equitable jurisdiction of the court cannot be invoked where there is a plain, speedy and adequate remedy at law. Certiorari presents such a remedy. Furthermore, as a general rule, injunction will not be granted to restrain the execution of a judgment, except upon allegations and proof that the party applying therefor has a defense to the suit upon its merits—*Van Buren v. Posteraro, supra.*

There is a decided conflict of authority as to whether equitable relief may be granted against a void judgment, where there is a remedy at law, by appeal, error or certiorari—Vol. 21, Case and Comment, p. 408; note to *Pickering v. Palmer,* 50 L. R. A. (N. S.) 1055, and cases cited. Our Su-

preme Court, in *Van Buren v. Posteraro, supra,* seems to follow the cases which hold that equitable relief will not be granted. To say the least, the remedy by injunction is not a *plain,* but an extremely doubtful, remedy. Unless it saw fit to waive it, plaintiff in error had the right to insist upon a review by certiorari and annullment of the judgment conceded to have been entered without jurisdiction—*Independent Pub. Co. v. American Press Assn.,* 102 Ala. 475, 15 So. 947; *Memphis & Charleston R. R. Co. v. Brannum,* 96 Ala. 461, 11 So. 468.

The order of the District Court quashing the writ of certiorari and awarding *procedendo* is reversed, and the cause remanded to the District Court with instructions to enter an order annulling the judgment of the Justice Court.

Reversed and Remanded.

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ABANDONMENT.

See MINING CLAIMS.

ABATEMENT.

Other Action Pending. Mortgage creditor having instituted in Weld District Court a bill of foreclosure, afterwards filed in Denver District Court a claim against the receivers of a railway company, for the mortgage moneys. The receivers were defendants in the foreclosure bill. Not having filed in that suit any plea of another action pending, or otherwise called attention to the mortgagee's claim in the Denver court, the receivers were held to have waived the irregularity.

The court observed that the receivers, by motion in the Denver court might obtain adequate relief.—*Continental Co. v. Patterson,* 186.

ACTIONS.

Legal or Equitable. Where, upon the facts alleged in the complaint, a money judgment affords full relief, allegations of fraud, abuse of confidence and the like, do not have the effect to convert the cause into one of equitable jurisdiction. It is still to be regarded as an action at law, though equitable relief is prayed. *Reyer v. Blaisdell,* 387.

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APPEALS AND ERROR.

Where Error Lies—Final Judgment. An order, upon mere motion, quashing the levy of an execution upon corporate stock is of the same effect as a decree obtained by an equitable suit, or by petition in intervention; and one who in this irregular manner obtains such relief, will not be heard to question the right of his adversary to a review of the order, upon error. Levy upon corporate stock standing upon the books of the corporation in the name of another than the execution defendant. Also, cotemporaneously with the levy, garnishee process served upon the corporation, and an answer showing that the execution defendant was entitled in equity to certain shares in the corporation. An order quashing the levy operates *prima facie* as a discharge of the garnishee and is therefor reviewable upon error by the express provisions of the code (Mills' An. Code, sec. 141, Rev. Code, sec. 157). *Ellis v. Gibbons,* 454.

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Harmless Error. Action for negligence, the complaint alleging a wilful and reckless disregard of the rights of plaintiff. The court directed the jury to find whether defendant was guilty of malice, and the question was answered in the affirmative. *Held*, there being no evidence of express malice, that, having regard to the statute allowing execution against the body the question should not have been submitted; but inasmuch as there might have been evidence or inference of malice, or wantonness, not appearing in the record, the court having regard to the statute allowing exemplary damages, declined to disturb the verdict.—*Cohen v. Fox*, 55.

An agreement between plaintiff and defendants provided that upon sales of land made by defendants to parties directed to them by plaintiff, plaintiff should receive two-thirds of all profits made. Defendants, dealing with one McClure, sent to them by plaintiff, sold to him certain of their own land, but as they asserted, were required, in order to affect the sale, to take in exchange lands of McClure, at an excessive valuation; that they traded these for other lands, which they afterwards sold, gaining in the three transactions no profit at all. The court charged that the defendants were not justified in denying plaintiff "his share of the profits on account of the McClure trade, unless he was a party to the last two transactions, *provided always profits were made.*" *Held*, that though the words italicized, not being clearly limited to the transaction with McClure, made the instruction ambiguous, the error was not sufficient to justify a reversal.—*Hughes v. Kerr*, 162.

Finding on Conflicting Evidence—Depositions. Where all material evidence for the successful party is by deposition, the court of review is

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Ballinger recovered judgment against Johnson upon a claim of the Stern-Prince Company, assigned to him for collection. Johnson adjusted the claim with that company, and by a decree of the district court Ballinger was required to enter satisfaction of the judgment, though the

APPEALS AND ERROR—Continued.

commission to which, by his agreements with the company, he was entitled had never been paid. The decree was reversed, with directions to the court below to enter judgment in favor of Ballinger unless, by a day named, the plaintiff should pay into court for the use of Ballinger the commission to which he was entitled, with interest from the date of the judgment; that Ballinger should thereupon execute and deliver a satisfaction piece, that upon his failure to do so, the judgment should be vacated; provided that if it should appear that Ballinger, at the institution of the suit or the entry of the judgment of reversal, was indebted to the Stern-Prince Company, the amount of such indebtedness should be set off against the claim of Ballinger; and the plaintiff was given leave to amend his reply.—*Ballinger v. Vates,* 116.

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Of a Chose in Action—For Collection—Effect. The assignee of a chose in action for collection holds the judgment recovered thereon as trustee for the assignor, but if by the terms of the assignment, or his agreement with the assignor, he is entitled to a share of the recovery, he cannot be required to enter satisfaction of the judgment until paid what he is entitled to.—*Ballinger v. Vates,* 116.

ASSUMPSIT.

Money Paid for Services Rendered by Disqualified Person. Where one employed as a school teacher, having a proper certificate at the commencement of her service, which expires before the expiration of the term of her employment, is permitted by the board to continue until the end of her term, and is paid for such service, the payment cannot be recovered—the parties are in *pari delicto.*—*School District v. Johnson,* 434.

ATTACHMENT.

Where Attachment Allowed. Plaintiff's action, being in the nature of *indebitatus assumpsit* for money obtained by fraud, and the complaint being sustained by sufficient evidence, a dissolution of the attachment is reversible error.—*Reyer v. Blaisdell,* 337.

Statute Strictly Construed. An attachment is a special remedy of law, except where authorized by statute in equitable causes.

And the code provisions (Rev. Code, secs. 98, 99) are strictly construed.—*Dygert v. Clem,* 286.

Of Lands—When the Lien Attaches. Whenever a copy of the attachment writ, with a description of the property attached, is filed with the Recorder of the county where the land is located.—*Reyer v. Teare,* 368.

Affidavit, must show an indebtedness.

The complaint alleged that defendants represented that one Glasgow would be, with plaintiffs and defendants, one of the purchasers of a horse, and on the faith of this promise, and the further promise that if Glasgow should not sign the promissory notes for the purchase money, subscribed by plaintiffs, they should be returned and cancelled; that, in fact, Glasgow had taken no interest in the horse, had never signed the notes, and that defendants had refused to return them, and plaintiffs feared that defendants would negotiate the notes. *Held,* that these averments constituted the basis of a suit in equity; that neither of the notes having been paid by plaintiffs no indebtedness from defendants to plaintiffs existed.—*Dygert v. Clem,* 286.

ATTORNEY.

Contingent Fee. Semble, an attorney may lawfully contract to conduct a litigation for a share of the recovery.—*Bell v. Lake County,* 192.

Lien. One who had recovered a judgment against the county agreed with an attorney that he should receive a certain percentage of the amount of the judgment for services in enforcing payment thereof. The agreement gave the attorney a lien upon the judgment not inferior to that conferred by the statute.—*Bell v. Lake County,* 192.

Any adjustment made by the county, in disregard of this lien after notice thereof, was at its peril.—*Id.*

The effect of an adjustment without notice not decided.—*Id.*

Misconduct. Action against a mining company for negligence causing the death of an employe in the mine. Plaintiff's counsel, in the examination of a juror on the *voir dire* asked if he was acquainted with the counsel appearing for the company, "who," he said, "represent the Ocean Insurance Company in this case." This assertion of counsel was a mere assumption, not justified by any evidence, and, as the court con-

ATTORNEY—Continued.
cluded, was an attempt to impress the jury with the idea that a verdict against the defendant would not be injurious to it. The court denounced it as "very reprehensible," justifying a reversal of a judgment in favor of plaintiff, where the evidence was equally balanced, or it appeared probable that the irrelevant matter so improperly brought to the attention of the jury had exercised a controlling influence in their deliberations.—*Parkdale Co. v. Taylor,* 304.

BAILMENT.
What May Be the Subject Of. A chose in action.—*Ballinger v. Vates,* 116.

BILL OF EXCEPTIONS.
When Necessary. The court of review may, in furtherance of justice, give relief against an error of the court below, even though no exception is reserved.—*Gougar v. Buffalo Co.,* 8.

BODY JUDGMENT.
See *EXECUTION AGAINST THE BODY.*

BROKER.
Right to Commissions. A broker employed by the owner of lands to find a purchaser therefor is not entitled to a commission unless he was the procuring cause of the sale. The evidence examined, and *held* that the broker, though he assisted in the sale, was not the procuring cause thereof.—*Williams v. Smith,* 23.

Action for Commissions—Ability of Purchaser Produced. It need not be shown that the purchaser offered by the broker had in actual cash the amount necessary to consummate the purchase. The equivalent of cash, *e. g.,* collateral readily convertible may suffice.

The evidence of the proposed purchaser's ability held sufficient to take the case to the jury.—*Paulsen v. Rourke,* 488.

Employment for a Time Certain, precludes the principal from the employment of another broker during the time limited. If during such time the principal sells through another broker he is liable to the one first employed, if within the time limited he produces a purchaser willing and able to buy.—*Paulsen v. Rourke,* 488.

CASES OVERRULED.
Distinguished or Explained. The doctrine of *Carico v. Kling,* 11 Colo. App. 349, as to the effect of the recitations of a trustee's deed is against the weight of authority, and is not to be extended.—*Page v. Gillett,* 204.

CASES OVERRULED—Continued.

The statement in the opinion in *Empire Co. v. Howell,* 22 Colo. App. 391, that "if defendant's title is bad he is not concerned with the defects in the trustee's deed, or the antecedent proceedings on which it is based," is too sweeping. Where, as in ejectment, the plaintiff is not in possession he is not to recover on the weakness of the adversary title.—*Page v. Gillett,* 204.

The declaration in *Lougee v. Wilson,* 24 Colo. App. 71, that upon plaintiff's proof of possession, or constructive possession, the burden is upon defendant to prove title, as in ejectment, declared *obiter,* and reconsidered.—*Strauss v. Thomas,* 213.

Mitchell v. Titus, 33 Colo. 386; *Eagan v. Mahoney,* 24 Colo. App. 285; *Mitchell v. Trowbridge,* 47 Colo. 6, explained.—*Id.* 213.

Tynon v. Despain, 22 Colo. 240, and *Blake v. Boyer,* 38 Colo. 55, explained.—*Edwards v. Roberts,* 538.

Clark Co. v. Centennial Co., 22 Colo. App. 174, explained—*Milwaukee Co. v. Thompson-Cristy Co.,* 155.

CERTIORARI.

Nature and Scope of the Writ. The certiorari allowed by Rev. Stat. secs. 3837 *et seq.,* is for the purpose of procuring a trial *de novo,* in the District or County Court, of a cause previously tried before a Justice of the Peace. It is a mere substitute for an appeal, and the party pursuing this remedy waives all question as to the jurisdiction over the person.

Otherwise as to a defect of jurisdiction of the subject matter.—*Union Pacific Co. v. Wolfe,* 567.

The purpose of the certiorari allowed by the Code (Rev. Code, sec. 331) is to review the action of an inferior tribunal, board, or officer, who, in exercising judicial functions, has exceeded the jurisdiction or grossly abused the discretion which the law reposes in such tribunal or officer, and no appeal is allowed, nor, in the judgment of the court, any plain, speedy and adequate remedy.—*Id.,* 567.

Judgment had been entered against the plaintiff in error in the court of a Justice, without any lawful service of process. *Held* that certiorari under the code was proper; that inasmuch as an appeal, or certiorari under Rev. Stat., sec. 3837, would have constrained the plaintiff in error to a waiver of its right to a lawful service of process, such appeal or statutory certiorari was not an adequate remedy.

Held, further, that the possible remedy by injunction was no bar to the remedy by certiorari.—*Id.,* 567.

CONTRACTS.

Validity. Under Rev. Stat., sec. 5990, the contract of a school district to employ as a teacher a person having no license to teach, is absolutely void. It binds neither party and requires no revocation.—*School District v. Johnson,* 433.

The mere fact that the person employed secured a license before the term appointed for her labors to begin, makes no change in the rule.—*Id.*

Otherwise, if, being so qualified, she is permitted by the school board to proceed with the performance of her contract. *Hotz v. School District,* 1 Colo. App. 40, and *School District v. Ross,* 4th Colo. App. 493, distinguished.—*Id.,* 433.

That the school board neglected to notify the teacher that her employment had been revoked, until the day before the term of her employment was to begin, *held* immaterial.—*Id.,* 433.

Public Policy. The courts are not hasty to declare void a contract deliberately entered into, upon consideration and not under the influence of any misrepresentation or false practice. But where a contract manifests upon its face a tendency to produce a condition prejudicial to the public it will be declared void.—*Buffalo Co. v. Gougar,* 523.

It was stipulated in writing that the plaintiff in error owned the patent charged to have been infringed, and that it secured to the plaintiff in error the exclusive right to manufacture, use and sell any fluid or compound for automatically healing punctures in pneumatic tires, and that such patent was valid; and the defendants in error admitted therein that they had infringed the same, and had thereby done the plaintiff in error considerable damage, and stipulated in consequence thereof, if plaintiff in error would forego bringing a suit for damages and an injunction, which was threatened, that defendants in error would not be guilty of future infringements, and bound themselves in the sum of $500.00 to keep such stipulation, and agreed that said sum should be liquidated damages, but should not include any damages that might be suffered for infringements subsequent to the date of the contract. *Held* that, under the admissions in the complaint by demurrer, and assuming everything charged in the complaint as true, said obligation does not manifestly tend to injure the public.—*Buffalo Co. v. Gougar,* 523.

Stipulation not to contest the validity of a patent for an invention, if not enforceable, is insufficient to warrant a denial of relief against an infringement of the patent on the ground that the written obligation contravenes a sound public policy; but King, J., Cunningham, P. J., and Hurlbut, J., were of the opinion that, inasmuch as the public are interested in the suppression of void patents, which ostensibly create a monopoly in articles extensively used by the public, it was against the policy of the law to give effect to a contract which might protect the false claims

CONTRACTS—Continued.

of one asserting such patents, and deter manufacturers and dealers from contesting their validity and scope.—*Id.*, 523.

Penalty or Liquidated Damages. Whether a sum named in a contract is liquidated damages or a penalty depends, not merely upon the words used, but the nature of the contract, the situation of the parties, and the attending circumstances.—*Gougar v. Buffalo Co.*, 8.

In general, where the stipulation is to pay a sum in gross for the non-performance of an agreement, the sum will be regarded as a penalty. So where a strict enforcement of the contract will work oppression. So if a gross sum is to be paid in case of the breach of any one of several covenants of different degrees of importance.—*Id.*, 8.

Defendants had been manufacturing and selling a compound for closing punctures in pneumatic tires. They executed a writing admitting the validity of certain patents held or claimed by the assignor of plaintiff, conferring the exclusive right, etc., admitting the infringement thereof in the past, and covenanting not to further infringe, etc., and in case of the violation of this covenant to pay, "as liquidated damages, not as a penalty," the sum of $500 for the past infringements. Action to recover the $500.00. There was no attempt on the part of the plaintiff to show what sales of the infringing substance had been made by defendants prior to the date of the contract, and the instrument referring to the damages occasioned by the infringement as only "considerable;" *held,* that the manifest purpose of the agreement was to coerce respect for the patents, and for this reason, and because, literally interpreted, the defendants would be liable in the full sum of $500 for an infringement, involving only nominal damages to the other party, the $500 must be regarded as a penalty.—*Id.*, 8.

If a writing assumes the form of a bond, with a condition that it shall be void on the performance or non-performance of some collateral thing, the presumption is that it is intended as a mere security, and not as a liquidation of damages. Very strong evidence is required to overthrow this presumption.—*Moore v. Kline*, 334.

So, in general, a sum of money in gross to be paid for the non-performance of an agreement is considered a penalty. One contending that such sum was intended as liquidated damages has the burden of showing that this was the intention of the contracting parties.—*Id.*, 334.

The question is to be determined by considering the nature of the contract, the situation of the parties and the attending circumstances; not merely upon the language used.—*Id.*, 334.

Construction. A contract in ambiguous terms will be construed most strongly against the party by whom it is formulated. The facility with which a particular provision, not appearing in a writing, might have been inserted, if in the minds of the parties, may be considered.—*Asmussen v. Post Co.*, 416.

CONTRACTS—Continued.

An ambiguous agreement is to be construed in the light of the subsequent conduct of the parties.—*Ruth v. Flynn*, 171.

Every contract is to be construed as a whole, effect being given to every phase, where this is possible, and works no injustice to either party.—*Jewel Tea Co. v. Watkins*, 494.

Where the words are susceptible of two constructions, one working injustice should be rejected in favor of one producing the opposite result.—*Id.*, 494.

Where the intention is manifest inapt expressions will be disregarded, and technical rules of construction will not defeat such intention.—*Id.*, 494.

The recitals of a contract are to be considered, as these sometimes have great influence in the interpretation.

General words following particular or specific terms are restricted in meaning to things of the same nature with those first mentioned.—*Id.*, 494.

In construing a contract the courts will consider not only the terms employed therein, but the attending circumstances.—*Buffalo Co. v. Gougar*, 523.

Construed. Defendant held legal title to a mining claim, in which plaintiff's father was, in equity, entitled to a two-thirds interest. Defendant had employed plaintiff at the monthly wage of $20.00 to make certain improvements thereon, and keep it in condition to be exhibited to those who might come to inspect it with a view to purchase. Plaintiff testified that, subsequently, defendant wrote him that his full monthly wage would be $90.00 and asked if he, plaintiff, would not be satisfied with $20.00, and look to his father for the balance; to which plaintiff responded that he would "look to whoever received the money when the property changed hands." *Held* that this correspondence had not the effect to establish, as against defendant, any addition to his previous obligations to plaintiff.—*Marshall v. Barry*, 236.

Pritchard and Lamont, being equal owners of certain mining premises, executed a penal bond to Lamont and two others, conditioned for the conveyance of said properties, on the payment of a sum certain at a specified date, the obligees "to be placed in full possession to mine, remove and sell ore therefrom."

Lamont and the other obligees formed a mining partnership, and for some time operated the property jointly. Lamont retiring from the partnership, and the other obligees having made due tender of the purchase money, Lamont was decreed to convey to them the undivided one-sixth of the properties.—*Lamont v. Reynolds*, 347.

Certain promissory notes held to be the notes of a corporation named, and not the individual notes of the principal officer thereof.—*White v. Hartman*, 475.

CONTRACTS—Continued.

A contract by a merchant employing a salesman provided that the salesman should not, within twelve months after quitting the merchant's service, "solicit or take orders or deliver orders for teas, coffees, etc., *or other merchandise,*" to any of the customers of the merchant, nor sell nor offer for sale, "teas, coffees, etc., or *other merchandise,*" during the life of the contract, nor for twelve months thereafter, in five certain cities and towns mentioned. *Held,* that the phrase "or other merchandise" was to be restricted to merchandise of the same character as that previously mentioned, and had not the effect to invalidate the contract; that both as to the time and territory the limitation was eminently reasonable and the contract enforcible.—*Jewel Co. v. Watkins,* 494.

A contract stipulated for the payment of $500 to the owners of a patent, for past infringements, and that the infringements should not be continued. *Held* that, there being no provision in said written obligation for the recovery of damages for infringements subsequent to the date thereof, except as follows: "but not for damages suffered subsequent to said date," it did not add to or take from the plaintiff in error any rights or remedies it had under the acts of Congress; and, therefore, the complaint, based upon such written obligation, did not state a cause of action, nor did said written obligation have the effect of depriving the U. S. courts of the exclusive jurisdiction to try causes for infringements of patent rights.—*Buffalo Co. v. Gougar,* 523.

By Correspondence. Defendant's letters to his confederate, by means of which plaintiffs were deceived and misled, some of which letters the confederate was instructed to exhibit to plaintiffs, and in others of which it was left to his discretion to exhibit or withhold them, created contractual relations between defendant and the injured plaintiffs, with the same effect as if defendant had corresponded directly with the latter.—*Reyer v. Blaisdell,* 387.

Executed. Only when nothing remains to be done, by either party, is the contract said to be executed. Plaintiff verbally agreed to sell lands to defendants, conveying a merchantable title. Her conveyance was executed, accepted and recorded, and part payment made upon the promised consideration. But upon examination of the records it appeared that plaintiff had no title. *Held* that the contract was still executory.—*McCutchen v. Klaes,* 374.

Performance. Where the plaintiff counts upon an executory contract, alleging performance, he can recover only on proof of full performance, or that defendant accepted as performance, what was done.—*Morris v. Hokosona,* 251.

Substantial Performance. Where substantial performance of a contract is accepted, recovery may be had upon the contract for the amount stipulated, less such amount as will compensate for the failure to make strict performance. If there be not such substantial performance no recovery can be had upon the contract.—*Id.,* 251.

CONTRACTS—Continued.

Deviations which are more than slight or trivial will defeat a recovery.—*Id.*, 251.

And the court should instruct the jury that substantial performance means an attempt in good faith to perform, strictly and fully, what the party has undertaken, and that only slight or inadvertent departures, not affecting the value of the structure, and which are capable of remedy, will be excused.—*Id.*, 251.

Evidence—Burden of Proof. The burden is upon the plaintiff to prove such substantial performance as will entitle him to recover and the amount necessary to compensate for his failure to strictly perform.

But the defendant may assume the burden of proving the amount necessary to make compensation.—*Id.*, 251.

CONVEYANCES.

Construed. A conveyance expressly reserved an equitable lien, called, indeed, a vendor's lien, until all the purchase money should be fully paid, "when this deed shall become absolute." *Held*, the manifest intention that the deed should not become absolute until full payment of the purchase money. "Grantee" construed to mean "grantor," where this was the manifest intention.—*White v. Hartman*, 475.

An incorporated town company, by deed dated July 14, 1894, conveyed to a trustee named, among other properties, "Block No. 15, according to the plat and subdivision of, etc.," "made by the Ordway Town & Land Company and of record in the office" of the recorder, etc. In ejectment plaintiff deraigned title under this conveyance. In fact, the plat was not recorded until October, 1894, but it was prepared, completed and approved by the directors of the town company on the day previous to the execution of the deed. *Held*, that the deed was effective, notwithstanding the false recital as to record of the plat.

The certificate attached to the plat, so recorded, contained an express confirmation of "deeds heretofore made," etc., but the court refer to this only in considering the earlier plat mentioned in the next point.—*State Savings & Trust Co. v. Matz*, 511.

Description of block in a town-site, by its number merely, and the name of the town, not expressly referring to the recorded plat, conveys the premises described by that number, as found in the plat; it is not required that there should be any express reference to the plat.—*State Co. v. Matz*, 511.

Patent—For Lands—Relation. A patent for lands purchased of the United States relates to the entry, and is conclusive evidence of compliance by the entryman with all the requirements of the Federal statutes. —*Carson v. Cudworth*, 131.

COUNTY COMMISSIONERS.

Proceedings—Record. A record is not always required to render the proceedings of the Board of County Commissioners binding.

And where question arises as to their action a liberal discretion should be exercised in receiving evidence of the attending circumstances, to aid in ascertaining the real purpose of what is set down.—*Mugrage v. The People*, 27.

The statute (Rev. Stat., secs. 1215, 1216) provides that the Board of County Commissioners shall at the time of the annual levy of the taxes pass a resolution which shall appropriate such sum or sums as may be deemed necessary to defray all expenses and liabilities for the next fiscal year, and specify the objects and purposes for which appropriations are made, and the amount appropriated for each purpose; that no further appropriation shall be made at any other time within such fiscal year; and that neither the board nor any officer of the county shall add to the county expenditures anything over and above the amount provided for by such resolution.

The only resolution of the board which could be termed an appropriation, directed levies upon the taxable property, etc., as follows: "For State Purposes, 4 mills; for County Redemption Fund, 5 mills; for County General Revenue, 10 mills; for Road Fund, 4 mills; for General School Fund, 4 mills—the same to be extended on the tax roll by the county assessor, and by him certified to the county treasurer for collection." *Held* that warrants regularly issued for unquestioned obligations of the county, and paid by the treasurer were to be credited to him in his account, in spite of the absence of any formal appropriation resolution, such as required by the statute; that the treasurer was not to be penalized for the omissions of the governing body of the county.—*Id.*, 27.

CORPORATIONS.

Transfer of Stock—Action to Compel. One holding shares in a corporation, by transfer, delivers the certificate evidencing such shares to an officer of the corporation, in order that the same may be transferred to his name, upon the corporate books, and a new certificate issued accordingly. The officer causes the transfer to be made to himself and other officers of the company.

Semble the shareholder is entitled to a bill in equity against the corporation, and the officers thereof in their official capacity, to correct the wrong.—*Whitehead v. Valley View Co.*, 114.

Affected by Knowledge and Conduct of Officers and Directors. The president and treasurer of a corporation borrowed of a bank, in the name of the corporation a sum of money which they applied to discharge a judgment against the corporation and the treasurer.

The bank having brought its action upon the promissory note of the corporation which was executed by the president and treasurer to evidence

CORPORATIONS—Continued.

this loan, the corporation contended that the judgment had been recovered for an individual liability of the treasurer, and that it had been collusively permitted by the president and treasurer, in order to satisfy the individual liability of the treasurer, at the expense of the corporation. But it appeared that during the pendency of the action in which this judgment was recovered, at least seven out of the thirteen directors of the corporation, its president, secretary, executive committee, and general counsel, had knowledge thereof, and made no question as to the propriety of its position as defendant; that the judgment came to the knowledge of the secretary, who was also a member of the board, and of the executive committee thereof, and was "generally known about the office of the company;" that at least one of the directors, and the secretary, who was also a director, knew of the loan, and the purpose to which the money was applied, and that no action was taken at the time to repudiate it. In view of these and other circumstances tending to show authority in the president and treasurer to borrow money in the name of the corporation it was *held* that the directors had, or should have had, full knowledge of the action of its officers in the premises, and that whether their conduct in permitting it to stand unquestioned was attributable to mere inattention, or to some other cause, the corporation was as fully bound towards those who acted without knowledge of any want of authority in the corporate officers as if the requisite power had been directly conferred.—*German American Co. v. State Bank*, 242.

COUNTY COURT.

Jurisdiction. Habeas corpus by a parent, demanding the custody of his infant child, is, under the statute (Rev. Stat. sec. 1526) within the jurisdiction of the County Court.—*Flynn v. Casper*, 344.

Appeal. An appeal lies from the County Court to the District Court. (Rev. Stat. sec. 1536).—*Id.*, 344.

Appeal From Justice. Trial in County Court is to be *de novo*, in a summary way, without written pleadings. No review of the judgment of the Justice is had, nor any attention paid to the proceedings before him. Each party has the same right in presenting his cause as if the action had originated in that court.

Distinction in the effect of an appeal with trial *de novo*, and an appeal in the nature of a writ of error, noticed.—*McCreary v. Brady*, 297.

Fees of Stenographer. Under Rev. Stat. secs. 1562-1564 the Board of County Commissioners have exclusive control of the question whether a stenographer shall be appointed for the County Court, and of his compensation. A resolution authorizing such appointment, and prescribing a monthly salary, "to be paid out of the 'County Judge Fee Fund'" not being assailed upon the ground that the statutory direction for a *per*

diem was disregarded, was held valid in its entirety. A payment made by the county judge to the stenographer, in excess of the County Judge Fee Fund was held a voluntary payment and not to be recovered. *Airy v. The People,* 21 Colo. 144, and *Blanchard v. Chaffee County,* 15 Colo. App. 410, distinguished.—*Thomas v. Teller County,* 139.

DAMAGES.

Measure of. Action for fraud in inducing plaintiff to accept promissory notes of one H., for promissory notes of one M. The damages are measured by the difference in value between the two sets of notes.—*Everist v. Drake,* 273.

Trespass to Land. Defendants having wrongfully entered upon a dam constructed by plaintiff, and cut a passage through the same, for their own use, without right, *held* on bill for an injunction brought by plaintiffs that the cost of the restoration of the plaintiff's works to their former condition was an element of damages, without regard to the contractual relation existing between the parties, the conditions of which had never been performed by plaintiff.—*Larimer County Co. v. Weld Co.,* 380.

Land Destroyed by Seepage—Future Crops. One who contends that his land was rendered utterly valueless by seepage, and demands as damages its full value, is not to be allowed for the loss of crops planted thereon in years subsequent to his having knowledge of this ruined condition.—*Larimer & Weld Co. v. Landers,* 1.

Future Suffering may be allowed for in an action for personal injuries.—*Colorado Springs, etc. Co. v. Marr,* 48.

Pleading as to. Pain and suffering, the natural consequence of a physical injury, may be allowed for, though not specifically demanded.—*Colorado Springs Co. v. Marr,* 48.

Action for personal injuries. There was no allegation of medical expense, nursing, or loss of time. An instruction to make an allowance on account of any of these matters was held error.—*Boulder v. Stewardson,* 290.

So as to an instruction to allow plaintiff for any loss of power to earn money, there being no allegation upon the subject.—*Id.*

Evidence as to. Action by a housewife for personal injuries. The evidence showed that prior to the injury plaintiff had been accustomed to do her own housework, to entertain her friends, and prepare for them elaborate meals, and that since the injury she had been a chronic invalid. An instruction that plaintiff was not to be allowed for her inability to perform her household duties, or for her inability to entertain her friends, or for loss of time, either past or future, was held properly refused.—*Colorado Springs Co. v. Marr,* 48.

DAMAGES—Continued.

Exemplary—Statute Construed. Malice as used in Rev. Stat. sec. 2067 may be inferred from reckless and wanton acts, such as disclose an utter disregard of consequences.—*Cohen v. Fox,* 55.

Construction of Verdict. Where the verdict is a general one, not showing that anything is allowed by way of punishment, and the jury were expressly charged that "the law does not require you to give exemplary damages," held there was no error in this respect.—*Clark v. Aldenhoven,* 501.

Duty of Plaintiff to Minimize His Injury. Plaintiff was aware in 1907 that his land was entirely ruined by seepage. Held, he was not to be allowed for the loss of crops planted there in subsequent years.—*Larimer and Weld Co. v. Landers,* 1.

DEATH.

See PARENT AND CHILD.

DECEIT.

False Representations, that the stock of a corporation has been practically subscribed and paid for, and that the corporation is possessed of valuable assets, known to be false by the party making them, entitles one who has been thereby deceived, and induced to purchase shares, to recover the money with which he has parted.—*Taylor v. Bastian,* 185.

Who Liable. Misrepresentations by one who contracts in his own name for the sale of the lands of another do not charge the owner of the land unless the vendor is shown to have been the agent of such owner.—*Ritter v. Idler,* 560.

See FRAUD.

DEDICATION.

See HIGHWAYS.

DEEDS.

See CONVEYANCES.

DEEDS OF TRUST.

Recitations of Trustee's Deed. The appointment of a trustee is not established by the recitations of his deed purporting to be in execution of the trust.

A deed purporting to be executed by two as trustees is no evidence of their appointment, or of the death of a third person, named as third trustee.—*Page v. Gillett,* 204.

Recitations of trustee's deed are *prima facie* proof of the matters recited.—*Empire Co. v. McPherin,* 225.

DEFAULT.

Power of the Court. Where the clerk merely enters the default of the defendant, the first clause of sec. 185 of the code has no application.

Where there is upon file a verified and sufficient complaint, and the defendant has been duly summoned, and fails to answer within the time allowed to him, the court has full control of all subsequent proceedings, and though no sum is named as demanded in the summons, may give judgment in favor of plaintiff for the amount to which he is entitled, not exceeding what is set down in the complaint. The provisions of sec. 185 of the code empowering the clerk to enter judgment by default in certain actions were not intended to impair the powers of the court.—*Griffing v. Smith,* 220.

Vacating—Surprise, etc., Diligence Required. A motion to vacate a judgment by default, rendered upon constructive service of process, under Rev. Code sec. 81 is addressed to the discretion of the court. Its action will not be disturbed unless a gross abuse of discretion appears.

A delay of over twenty days in applying to vacate a judgment, after the defendant has notice thereof, is sufficient ground to deny the application.—*Hollingsworth v. Ring,* 121.

EASEMENTS.

By Prescription. Land owner "gave" the right of way over his lands for a lateral ditch, to enable a neighbor to conduct water to the lands of the latter for the irrigation thereof, and assisted in the excavation of the lateral. The lateral was maintained and enjoyed for twenty-five years or thereabouts, without question or objection. *Held,* the title thereto was as complete as if acquired by purchase or condemnation.—*Sebold v. Rieger,* 209.

Servient Tenement—Right of Owner. The owner of lands over which another has acquired an easement to maintain a lateral ditch, for the irrigation of his lands, is not, merely by his property in the servient tenement, entitled to divert water from such lateral, to the prejudice of the owner of the dominant tenement. Secs. 3170, 3171 of the Revised Statutes have not the effect to confer such right.

Whether by proceeding under the statute the right to enlarge the lateral may be acquired, not decided.—*Sebold v. Rieger,* 209.

ELECTIONS.

Notice Posted Upon Sunday. The notice for a school district election, upon the question of issuing bonds for raising funds to construct and equip a school-house, may be effectually posted upon a Sunday.—*Phillips Co. v. School District,* 362.

Substantial Compliance with Statute. An election to determine whether a school district shall issue its bonds for a purpose authorized by statute will not be invalidated by technical irregularities, no prejudice to any person appearing, *e. g.* the failure to publish the notice of the

ELECTIONS—Continued.
election for the full time prescribed by statute; or the failure of the school board, who acted as judges of the election, to certify to themselves the result of the election, before canvassing the vote, as expressly required by statute (Laws 1909, c. 205, sec 7). *Id.*, 362.

The statute expressly required the judges of certain school district elections to certify the result to the Board of Directors of the district, and provided that the board should, "after receiving such return," canvass the vote and determine the result of the election. (Laws 1909, c. 205, sec 7.) The directors having themselves acted as judges of the election, their failure to certify to themselves what was already within their knowledge had not the effect to invalidate the election.—*Id.*, 362.

EQUITY.

Jurisdiction—Public Lands—Mistake of Land Officers Corrected. Equity has always assumed jurisdiction to grant relief where by mistake of the land officers of the United States, lands to which, one party is entitled, have been patented to another.—*Snider v. Ostrander,* 468.

Decree—Cancelling Patent. The decree in such case should not cancel the patent, but declare the party who has obtained the title trustee for the one entitled thereto.—*Id.*, 468.

Maxims. Equity will not decree a useless thing to be done, *e. g.* to require the mother to do that which, as the natural guardian of her minor children it may be her duty to prevent.—*Workman v. Stephenson,* 339.

Coming with Clean Hands. Plaintiff sued to rescind an exchange of lands for corporate stock, on the ground of fraudulent representations made by defendant, as to the value of the stock. But he himself, in the negotiation had falsely exaggerated the value of the land. The court observe that he did not come into court with unsoiled hands. But the judgment was put upon other grounds.—*Moore v. Carrick,* 97.

ESTOPPEL.

By Conduct. The rule that as between persons equally innocent, a loss resulting from the frauds of another shall rest upon him by whose act or omission the fraud has been made possible, only operates to protect those who, in dealing with others exercise ordinary care and prudence; and as against those who have voluntarily conferred upon the perpetrator of the fraud the usual *indicia* of title, so that they have apparent authority to dispose of the property. The owner of goods is not to be affected by a sale by one having the mere manual possession of the goods, or the muniments of title. The owner must be guilty of some act or omission of such nature as to mislead an innocent person as to the true position of the title.—*Rocky Mountain Fuel Company v. George N. Sparling Coal Company,* 260.

Plaintiffs being about to begin the construction of certain irrigation works, offered defendant an undivided interest in the contemplated works,

ESTOPPEL—Continued.

upon certain conditions, one being the payment of $1,000. Defendants accepted the offer and paid $400.00 on account of the $1,000, but made no promise to pay, and never did pay the remaining $600. Nevertheless, defendants, later, entered upon the dam, cut a channel therein for the passage of water to a new headgate in their own ditch, and in an action brought by plaintiffs for an injunction, claimed an interest in the plaintiff's works, by virtue of the payment of the $400, and its retention by plaintiff.

Held they were estopped to deny acceptance of the offer made by plaintiff, and before they were entitled to enter upon plaintiff's works, or interfere with plaintiff's control thereof, they were under duty to pay the residue of the stipulated amount.—*Larimer County Co. v. Weld Co.*, 380.

Defendant employed plaintiff to find a purchaser for certain lands, but refused to convey to the purchaser produced by plaintiff, on the ground that he himself had already sold the land. In the agent's action for commissions the principal will not be heard to assert another ground as justifying his refusal.—*Paulsen v. Rourke*, 488.

Land owner without objection or protest acquiesces in the construction by another of a dam or like works for the diversion or storage of water for irrigation, the effect of which is to flood and submerge a part of his lands; he is estopped from afterwards maintaining either ejectment or trespass for the entry.

His only remedy is an action for damages and the right of action vests in the one having the title to the land at the time of the entry.—*Edwards v. Roberts*, 537.

A county is estopped to assert the irregularities of its governing body, as a ground to charge a subordinate officer, who acts in good faith, in paying out the public moneys.—*Mugrage v. The People*, 27.

EVIDENCE.

Presumptions. Each of the members of a partnership took out a policy of insurance upon his life, in favor of the firm. It was presumed that the two were in similar terms.—*Ruth v. Flynn*, 171.

One presumption is not to be founded upon another.—*City of Boulder v. Stewardson*, 290.

It appearing that the traverse of an attachment had been tried in the court below, without objection, the presumption was indulged that the traverse had been duly filed, though nowhere appearing in the record. —*Ryer v. Blaisdell*, 387.

Presumed that a contract presented by one party for the signature of the other, was formulated by the one so presenting it.—*Asmussen v. Post Co.*, 416.

EVIDENCE—Continued.

Judicial Notice. Not taken that a steam roller standing on the margin of a street is calculated to frighten an ordinarily gentle horse.—*Boulder v. Stewardson*, 290.

Judicial notice, taken, of the acts of Congress known as the Pacific Railroad Acts.—*Edwards v. Roberts*, 538.

Burden of Proof. If in a proceeding to enforce a mechanic's lien the land owner would avail himself of the fact that contract was duly recorded, he has the burden of proof.—*Kennicott-Patterson Co. v. Modern Co.*, 135.

Where a land owner asserts the right to divert water from the lateral ditch of another, across his lands, he has the burden of proving that such diversion will not be injurious to the proprietor of the lateral ditch.—*Sebold v. Rieger*, 209.

Where the plaintiff counts upon an executory contract, alleging performance, he can recover only on proof of full performance, or that defendant accepted as performance, what was done.

The burden is upon the plaintiff to prove such substantial performance as will entitle him to recover and the amount necessary to compensate for his failure to strictly perform.

But the defendant may assume the burden of proving the amount necessary to make compensation.—*Morris v. Hokosona*, 251.

The principal asserting a revocation of the agent's authority has the burden of proof.—*Paulsen v. Rourke*, 488.

And defending the action of a broker for commissions upon a sale of land, on the ground that he had himself already sold to another, has the burden to prove such sale.—*Id.*, 488.

Relevancy. Barton and Blaisdell owned a tract of land in undivided moieties. Barton, by a deed not recorded, conveyed his moiety to Blaisdell, merely to enable the latter to effect a sale thereof for Barton. Subsequently Barton and others, in an action against Blaisdell, levied an attachment upon the whole tract, as the property of Blaisdell. *Held* that correspondence between Barton and Blaisdell, solely in reference to Barton's interest, and his conduct as Blaisdell's agent, had no tendency to give notice to any of the plaintiffs of any sale, or contemplated sale, of Blaisdell's interest.—*Reyer v. Teare*, 368.

Public Records and Documents. A receipt for the purchase money of lands issued by the receiver of a land office of the United States is *prima facie* evidence of title to the lands therein described (Rev. Stat. sec. 2494).—*Carson v. Cudworth*, 131.

Lease of real property not acknowledged. The record thereof is not admissible (Rev. Stat. sec. 696).—*Milwaukee Co. v. Thompson-Cristy Co.*, 155.

Proceedings of County Commissioners. See COUNTY COMMISSIONERS.

EVIDENCE—Continued.

Parol Admissible, even in ejectment, to identify the premises intended by the words of description used in a conveyance, *e. g.* evidence that the description in a conveyance of a block in a town-site was such as was commonly used in conveyances of premises within the same town-site.—*State Co. v. Matz,* 511.

But evidence to show that a different tract from that described was intended is not admissible.—*Id.,* 51.

Admissions—By Conduct. One for whom another, without authority, has assumed to act must not only disavow and repudiate what has been done, but must also give notice of such repudiation to those to be affected thereby, if he would avoid the inference of assent, which the court or jury are otherwise at liberty to indulge.—*German American Co. v. State Bank,* 242.

Admissions—In Pleading. The answer conceded that plaintiff was entitled to a sum named, and offered to permit judgment for that amount. This offer was afterwards withdrawn, the admission however remaining. *Held,* that upon this admission, and matters in proof, plaintiff was entitled to a directed verdict for the amount admitted.—*Hughes v. Kerr,* 162.

Bill to Quiet Title. Answer setting up certain tax deeds and pleading the five years' statute of limitations. Reply that the deeds show a non-compliance with the statute, "and by reason thereof are wholly void." *Held* not to dispense with the production of the deeds.—*Empire Co. v. McPherrin,* 225.

One is not to be heard to object to a description of the premises in controversy by reference to a particular plat, when in his own pleadings he refers, as a basis of recovery, to a plat which the record shows is identical with that to which objection is made.—*State Co. v. Matz,* 511.

Declarations—Non-Judicial, are not evidence against a third person who was not present.—*Ritter v. Idler,* 560.

Opinions. A witness testified that in his opinion the damage sustained by the owner of a particular patent, by reason of the infringement thereof were impossible of computation. *Held* mere conjecture and of no legal efficacy.—*Gougar v. Buffalo Co.,* 8.

Prima Facie. Possession of lands under a conveyance purporting to convey them is *prima facie* evidence of title in fee.—*Strauss v. Thomas,* 213.

Objections to Testimony. An objection that a particular matter offered in evidence is "incompetent, irrelevant and immaterial and not responsive to any issue in the cause," does not challenge the sufficiency of the answer under which the evidence is offered.—*Gibson v. Huft,* 144.

Depositions. Effect on appeal.—*Moore v. Carrick,* 97.

Measure of Proof Required. A charge of fraud must be established by positive, clear and convincing evidence.—*Everist v. Drake,* 273.

EVIDENCE—Continued.

About ten days previous to the injury complained of defendant's employes had left upon the margin of the street a steam roller and the coal wagon used with it. As plaintiff was driving upon the street about 5 P. M. on the 18th of November, the horse, near the steam roller, veered from the street to the curbing; the buggy was upset, and plaintiff and another lady with her, were thrown out. The horse himself escaped, but was afterwards captured, with the buggy and harness badly damaged. Plaintiff had not seen the steam roller before the accident or afterwards. Immediately before, or at the instant the horse bolted, the other lady exclaimed, "Oh, what's that." This exclamation, or what occasioned it, was not explained. The only occupants of the buggy were the plaintiff, the other lady, and two children whose ages were not shown. No attempt was made to show that the misconduct of the horse could be attributed only to fright at the presence of the roller. The other lady, although within the state, was not called. The inference that the presence of the steam roller occasioned the fright of the horse, if he was frightened, it was said, was therefore based wholly on presumption, while the facts shown would as reasonably warrant a different inference. It was held therefore that inasmuch as mere theories and inferences do not authorize a verdict in causes of this character, unless the conclusion of liability is the only one which can reasonably be drawn from the facts proven, the plaintiff had failed.—*City of Boulder v. Stewardson,* 290.

Circumstantial evidence is sufficient to establish negligence; direct evidence is not required.—*Parkdale Fuel Co. v. Taylor,* 304.

Action for the death of one employed in a coal mine, attributed to negligence of the mine owner in failing to provide places of refuge, along the slope where the cars were operated for removing the coal, and the employes were wont to pass in going to and from the lower workings; also in failing to provide proper appliances to prevent the escape of cars into the slope.

Evidence examined and *held* sufficient to warrant a verdict for plaintiff.—*Parkdale Co. v. Taylor,* 304.

Action by land-broker for commissions. Meager evidence of the ability of the proposed purchaser held sufficient to go to the jury.—*Paulsen v. Rourke,* 488.

EXECUTIONS.

What May Be Taken in Execution—Equitable Interest in Corporate Stock Leviable. Sections 4167, 4172, Mills' Stat. (Rev. Stat., secs. 3617, 3622), and sec. 140, Mills' Code (Rev. Code, sec. 156) are to be considered as *in pari materia.* The interest of the pledgor in corporate stock may be taken in execution in the manner prescribed by these provisions of the statute, even though nothing appears in the books of the corporation to show such interest.—*Ellis v. Gibbons,* 454.

EXECUTIONS—Continued.

The stock is leviable, even though the pledgor's right is evidenced by an equitable decree, from which an appeal still lies.—*Id.*, 454.

The shares are not, after such decree, *in custodia legis*. It is not necessary for the sheriff to disturb the pledgee's possession of the stock certificate, nor need notice of the levy be given to the execution defendant.—*Id.*, 454.

Complying with the statute such possession as is possible, and such as is contemplated by the statute, is secured.—*Id.*, 454.

The proceedings taken by the creditor set forth, and held to show a substantial compliance with the statute.—*Id.*, 454.

EXECUTION AGAINST THE BODY.

Malice—Statute Construed. Malice as used in Rev. Stat. sec. 3024 is to be taken in its odious and malevolent sense.—*Cohen v. Fox*, 55.

Verdict. To justify execution against the body malice must be distinctly found.—*Id.*, 55.

FRAUD.

Definition. Actionable fraud is the false representation of a material fact, as distinguished from opinion, made with knowledge of its falsity, or recklessly, without belief in its truth, with intent to induce action by the complaining party, and accepted and acted upon by him, as true, to his injury.

The statement of one offering corporate shares for sale or exchange, that "the stock is good so far as I know," he having no peculiar means of knowledge as to the matter, is a mere expression of opinion, and not to be relied upon as a representation.—*Moore v. Carrick*, 97.

Rescission of Contract for. Where, in an equitable action to rescind a contract, actual and intended fraud is relied upon, the same rules apply as in actions at law for deceit.—*Moore v. Carrick*, 97.

False Representations Not Relied Upon, by the party to whom they are made, he making independent investigation, afford no action, except in cases of active fraud or concealment, or when fiduciary relations exist, or where peculiar knowledge on the part of the one making the representation is shown.—*Moore v. Carrick*, 97.

False Representations to Which Defendant was Not a Party. Everist negotiating with Drake for the change of the lands of Drake for certain promissory notes of one Matzik, made certain representations as to the value of these notes. *Held*, that others, who, at a later date, in association with Everist, induced Drake to part with the Matzik notes, were not chargeable with the representations made by Everist on the first occasion.—*Everist v. Drake*, 273.

Expressions of Opinion as to Value. Parties dealing at arm's length about a proposed exchange of promissory notes are not chargeable with fraud for mere expressions of opinion as to the value of the notes. To

FRAUD—Continued.
sustain the charge in such case it must appear, in addition to the exaggerated statement of value, that the party complaining, though using reasonable prudence and caution, was fraudulently tricked into reliance upon such false statements.

One who purchases promissory notes secured by mortgage of lands, without examination of the lands, having opportunity to do so, and not being induced to omit such examination by any trick of the vendor, cannot rely upon exaggerated statements made by the vendor to support a charge of fraud.—*Everist v. Drake*, 273.

The evidence examined and held insufficient to sustain plaintiff's action.—*Id.*, 273.

Remedies. Defendant having acquired from the owners of certain mining claims, situate in the State of Nevada, a bond for deed, or an agreement of sale therefor, for the price of $625.00, represented to plaintiffs that the claims were of immense value and could be purchased, but named the price at $25,000. Plaintiffs all resided in Pennsylvania, but had been associated in business with defendant, and he enjoyed their absolute confidence. One of them only, through whom defendant corresponded, and who played the part of a stool pigeon, knew the facts. Acting upon defendant's representations plaintiffs agreed with him for the purchase of the mining claims on joint account of all parties. The sum of $25,000 was raised upon the joint note and remitted to the plaintiff, who consummated the purchase, paying for the property the sum of $625.00 and retaining the residue, except a portion thereof which he paid to his confederate. *Held* that defendant held the difference between the two sums as trustee for plaintiffs; that upon discovery of the fraud plaintiffs might have repudiated the entire transaction, placed defendant in *statu quo*, and sued in tort for their damages; or might waive the tort and bring an action in the nature of *indebitatus assumpsit*, to recover the excess in defendant's hands.—*Reyer v. Blaisdell*, 387.

Held, further, that the confederate, by whose aid in conducting the correspondence defendant was enabled to accomplish the fraud, was liable to the innocent plaintiffs for whatever of the proceeds of the fraud had come to his hands, even though he made no representations as of his own knowledge, but only served as the emissary of defendant to convey the false representations of the latter to his associates.—*Id.*, 387.

Held, further, that the form of the action against him was of no moment.—*Id.*, 387.

Evidence. A charge of fraud must be supported by positive, clear and convincing evidence.—*Everist v. Drake*, 273.

See DECEIT.

FRAUDULENT CONVEYANCES.

Improvements Made by Purchaser With Notice of the fraud, and without necessity, are made at his peril.—*Tibbetts v. Terrill*, 64.

GUARANTY.

Notice of Acceptance to Guarantor. One who guarantees the payment of a debt to be created in the future, and of uncertain amount, is entitled to notice that his guaranty is accepted, and credit given on the faith thereof. Until notice is given of the acceptance, the guarantor may withdraw.—*Asmussen v. Post Co.,* 416.

It is not required that notice be given directly to the guarantor; information coming to the guarantor that the guaranty is being acted upon will suffice to bind him.—*Id.,* 416.

Construed. An application, dated December 12, by Farrell for an appointment as agent of plaintiff, at a city named, followed by special engagements on Farrell's part, and an acceptance by plaintiff's agent, dated December 14, addressed to plaintiff and subscribed by defendants in these words: "In consideration of your acceptance of the foregoing application by * * *, the undersigned guarantee the fulfillment of each stipulation of the above contract and the prompt payment for all papers and supplies furnished thereunder, and in case such payment is not made, to pay you at your office in Denver, all the arrears upon demand."

Held, a mere proposal to become liable, upon condition only that Farrell's application should, within a reasonable time, be accepted by plaintiff; and that defendants became liable only upon notice thereafter, in some form, that their proposal had been accepted by plaintiff. *News-Times Company v. Doolittle,* 51 Colo. 386, distinguished.—*Asmussen v. Post Co.,* 416.

HABEAS CORPUS.

Statute Construed. The habeas corpus act (Rev. Stat. c. LXI.) was enacted peculiarly, if not solely, to provide for the discharge of those illegally detained upon a criminal accusation, or in a civil action for tortious misconduct, and does not take away the common law writ where the restraint complained of is a mere incident to the right of custody of the person restrained, and the future disposition of such person is to be adjudicated, *e. g.* where the parent seeks the custody of his infant child.—*Flynn v. Casper,* 344.

Jurisdiction of County Court. Habeas corpus by a parent, demanding the custody of his infant child, is, under the statute (Rev. Stat. sec. 1526) within the jurisdiction of the County Court.—*Id.,* 344.

Appeal. An appeal lies from the County Court to the District Court. (Rev. Stat. sec. 1536).—*Id.,* 344.

HIGHWAYS.

Dedication—At Common Law, operates by way of estoppel *in pais,* and not as a grant. To complete it, it must be accepted by the public authorities.—*Town of Center v. Collier,* 354.

HIGHWAYS—Continued.

Filing Plat of Townsite—Effect. The owner of lands files in the Recorder's office a town plat thereof showing lots, blocks and streets, but not acknowledged. This, with subsequent conveyances of lots, with reference to the plat, constitutes an offer to dedicate to public use the streets defined in the plat. The offer must be accepted by the public within reasonable time, or the right to accept is lost.—*Id.*, 354.

Acceptance, may be manifested by an ordinance or resolution, by possession taken and improvements made, by use of the public for travel, and the like.—*Id.*, 354.

Revocation. If the land owner, after the lapse of a reasonable time, without acceptance, conveys the lands designated upon the plat as a street, this is a revocation of the offer to dedicate.—*Id.*, 354.

HOMESTEAD.

Claim of—Effect. A claim of specified premises, by qualified person, filed in the Recorder's office, takes precedence of a general lien, *e. g.* the lien of a judgment under which no levy has been made.—*White v. Hartman*, 475.

Subordinate to an Equitable Lien, for the purchase money of the premises, evidenced by reservation contained in the deed by which they are conveyed, and by the covenant of the grantee in such conveyance.—*Id.*, 475.

INJUNCTION.

To Restrain Trespass to Land—Title Immaterial. Defendants having accepted a proposition of plaintiffs by which they were to enjoy certain irrigation works of plaintiffs upon certain conditions, among others that defendants should pay a certain sum of money, entered upon these works and assumed to make changes therein for their own convenience. Injunction allowed, restraining them from entering upon or utilizing the works of plaintiff until they had fully complied with the conditions of their agreement.—*Larimer County Co. v. Larimer and Weld Co.*, 380.

Held, further, that the title to the site of the dam was immaterial, so long as no title appeared in defendants. —*Id.*, 380.

Many examples cited of like relief granted in like cases.—*Id.*, 380.

To Stay Execution of Void Judgment. Doubted whether the writ will be awarded where there is an appeal, writ of error or certiorari.—*Union Pacific Co. v. Wolfe*, 567.

IMPRISONMENT FOR DEBT.

See EXECUTION AGAINST THE BODY.

INSTRUCTIONS.

To Be Construed as a Whole. Action by passenger against carrier for injuries attributed to the negligent setting in motion of the car while

INSTRUCTIONS—Continued.
plaintiff was in the act of alighting. An instruction told the jury that the action was for negligence in the operation of the car, "in stopping and starting it." There was no allegation or proof of negligence in stopping the car. Other points of the charge fully presented to the jury that plaintiff claimed for negligence in starting the car. *Held* that construed as a whole the charge was not misleading.

An instruction declared that plaintiff was claiming for the "negligent manner in which the defendant operated and controlled its car." It was argued that this assumed negligence on the part of defendant. By another point in the charge the jury were told that "the burden of proof rests upon plaintiff to establish the negligent acts of which he complains." The contention was overruled.—*Colorado Springs Co. v. Marr*, 48.

INTEREST.

When Allowed. The value of improvements made by the defendant allowed to him under Rev. Stat. 5733 does not bear interest, prior to judgment.—*Hapney v. Dunn*, 412.

IRRIGATION.

See WATER RIGHTS.

IRRIGATION DISTRICTS.

Lands Held by Receiver's Receipt, no patent having issued, may be embraced therein.—*Carson v. Cudworth*, 131.

JUDGMENTS.

Rights of Several. It seems from *Jones v. Perot*, 19 Colo. 141, that the ultimate rights of the parties between themselves, respectively, may be determined in one judgment, whether they have equal or different interests in the subject matter of the litigation.—*Reyer v. Blaisdell*, 387.

Record as Evidence. The mere record entry of a decree quieting title, not accompanied by the judgment roll, is not admissible as evidence of title.—*Miller v. Weldon*, 108; *Empire Co. v. Weldon*, 111; *King v. Foster*, 120.

Signature of Judge, not required.—*Hollingsworth v. Ring*, 121.

Surplusage. The court below having improperly awarded execution against the body, this clause of the judgment was ordered stricken out.—*Cohen v. Fox*, 55.

JURISDICTION.

Of the Subject Matter. Mortgage creditor filed in Weld District Court a bill to foreclose the mortgage. A month later, in the Denver District Court, receivers were appointed for a railway company which was equitably entitled to the mortgaged premises. *Held,* by the filing of the foreclosure bill the Weld District Court acquired jurisdiction of

JURISDICTION—Continued.

the subject matter of the litigation, and might lawfully proceed to decree foreclosure.—*Continental Co. v. Patterson,* 186.

Defect, of. The want of jurisdiction of the subject matter is incurable by laches of the parties, and whenever discovered it is the duty of the court, on suggestion of counsel, or on its own motion, to dismiss the action.—*Buffalo Co. v. Gougar,* 523.

JUSTICE OF THE PEACE.

Appeal—By One of Several—Bond Construed. Judgment before a Justice of the Peace against Brady, Bauman and the Crescent Company. Brady alone appealed, and gave bond, reciting that *he* had taken an appeal to the County Court, and in the words of condition, following the statute. On trial in the County Court Brady and the company were discharged and judgment given against Bauman. *Held* that Brady had prosecuted his appeal with effect; and that under the statute he was not chargeable upon the condition of the bond to pay "whatever judgment may be rendered."—*McCreary v. Brady,* 297.

LICENSE.

Parol—Revocation. A parol license to occupy the lands of the licenser for a way, or the like, is revocable until acted upon by the licensee.—*Workman v. Stephenson,* 339.

If the owner fence or obstruct the way this is a revocation of the license.—*Id.,* 339.

Payment of Consideration, is not a controlling element in the question whether a license is revocable, though important. Generally there must be other elements.—*Id.,* 339.

Terms of the License Must Be Certain. An agreement for a way over particular lands, nothing being said as to its width, is too uncertain to confer a right.—*Workman v. Stephenson,* 339.

LIFE INSURANCE.

Insurable Interest. The partnership has an insurable interest in the life of each partner; but upon the dissolution of the firm such interest terminates.—*Ruth v. Flynn,* 171.

Construction of Policy. A policy of insurance upon the life of one of the members of a partnership named the firm as the beneficiary, with the addition "or if the insured survives the aforesaid beneficiary, to the administrators of the insured." *Held,* that upon the dissolution of the partnership the personal representative of the insured partner was, *ipso facto,* substituted as the beneficiary in the policy.—*Ruth v. Flynn,* 171.

LIMITATIONS.

Pleading. Payment of taxes under color of title must, to avail, be pleaded with exactness. A paper title, obtained in good faith, must be shown.

Where the defendant fails to allege good faith in the acquisition of the title, or give any evidence of good faith, it is error to exclude evidence that the payment of taxes for a portion of the seven-year period was made under another and different deed than that relied upon in proof. Such testimony tends to prove lack of faith in the first title, and a transfer of faith to that subsequently acquired, which would change the date from which the seven-year period should be computed. 144.

Color of Title—Payment of Taxes. A tax past due when a treasurer's deed is issued is not to be counted to sustain a plea of the seven years' statute. (Rev. Stat. sec. 4090.)—*Miller v. Weldon,* 108; *Empire Co. v. Weldon,* 111.

Actual possession and payment of taxes, for seven years, without color of title acquired in good faith, prior to the commencement of the seven-year period, is not sufficient to sustain a plea of the statute (Rev. Stat. sec. 4089).—*King v. Foster,* 120.

To give advantage of the seven years' limitation (Rev. Stat. sec. 4089) seven years must intervene between the first payment of taxes and the institution of an action by the holder of the paramount title.—*Empire Co. v. McPherin,* 225; *Empire Co. v. Brownson,* 228.

Good Faith, may be inferred from the conduct of the party.—*Gibson v. Huff,* 144.

Void Deed. A deed void upon its face does not set in motion the five-year limitation act. (Rev. Stat. sec. 5733.) *Miller v. Weldon,* 108; *Empire Co. v. Weldon,* 111; *Empire Co. v. Brownson,* 228.

MANDAMUS.

Character of the Writ. Mandamus, with us, is no longer a prerogative writ, but an ordinary civil action. The pleadings are controlled by the same rules which control in other actions. The same measure of certainty and no other is required, and the statute of amendments applies to this as to other actions.—*Krier v. Walsenburg,* 150.

Parties. Petition for mandamus requiring the town clerk to issue a license to the petitioner. It is not required that the mayor and trustees of the town be joined.—*Krier v. Walsenburg,* 150.

MASTER AND SERVANT.

Master's Liability for Acts of Servant. A master is liable for the negligence of the servant occurring when the servant is acting within the scope of his employment. The purpose of the act in which the servant is engaged when the negligence occurs, rather than the method of its performance, is the test of the master's liability. One employed in a public garage was sent to obtain a battery which had been left with

MASTER AND SERVANT—Continued.

another establishment to be charged. Against the express prohibition of the master he took from the garage, for this mission, the auto car of a patron of the garage which was stored there, subject to the call of the owner. While returning with the charged battery he negligently ran upon and injured the plaintiff. *Held* that the servant was acting within the scope of his employment.—*Gibson v. Dupree,* 324.

Deviation of the Servant About His Own Affairs. The liability of the master is not affected by a slight deviation of the servant for his own ends, when about the business of the master.—*Id.,* 324.

The servant, prior to the accident, and after he had obtained that for which he had been sent, had gone upon an errand of his own. The jury having found that the accident occurred while the servant was acting within the scope of his employment, the finding was approved.—*Id.,* 324.

MAXIMS.

Blowing Hot and Cold. The principal's repudiation of the acts of his agent must be entire. He may not, knowing all the facts, approve and accept the acts of the agent, and then repudiate them in part, to the injury of third persons.—*Council v. United States Co.,* 284.

Lex non cogit ad vana. Equity will not require the mother to do that which, as the natural guardian of her children, it may be her duty to prevent.—*Workman v. Stephenson,* 339.

The statute expressly required the judges of certain school district elections to certify the result to the Board of Directors of the district, and provided that the board should, "after receiving such return," canvass the vote and determine the result of the election. (Laws 1909, c. 205, sec. 7.) The directors having themselves acted as judges of the election, their failure to certify to themselves what was already within their knowledge had not the effect to invalidate the election.—*Phillips Co. v. School District,* 362.

False Demonstration, does not vitiate, if the thing intended is otherwise sufficiently described.—*Miller v. Davis,* 483.

MECHANICS' LIENS.

For What a Lien Is Granted. Work done in the extraction of coal, from a coal mine, does not give a lien.—*Empire Co. v. Rosa,* 230.

Improvements by Lessee. A lease and bond of a mine containing no provision for the erection of buildings, or for any improvement save that incidental to active mining, does not authorize the lessee to impose a lien upon the premises for materials furnished for enlarging and equipping a mill situate thereon. *Clark Co. v. Centennial Company,* 22 Colo. App. 174, explained.—*Milwaukee Co. v. Tomkins-Cristy Co.,* 155.

The lease of a coal mine, not providing for specific improvements by the lessee, does not authorize the imposition of a lien upon the interest

of the lessor, for work done or improvements made by the lessee.—*Empire Co. v. Rosa,* 230.

Improvements Made by Vendee, pursuant to the express provisions of his contract of purchase, give a lien upon the interests of both vendor and vendee.—*Miller v. Davis,* 483.

Improvements Made With Owner's Knowledge. One seeking to enforce a lien under Rev. Stat. sec. 4029 for improvements made with the knowledge of the owner, must both allege and prove such knowledge, and further that the materials for which the lien is claimed were furnished to be used in the particular improvement in question, and notice to the owner of such intended use.

An allegation that "at the time of furnishing said supplies defendant had full knowledge and notice thereof" is not sufficient.—*Milwaukee Co. v. Tomkins-Cristy Co.,* 155.

Lien for Material. One seeking to enforce a lien for material must prove a mutual understanding existing at the time of the delivery, that the material is to be used for the particular structure or improvement in respect of which the lien is claimed.—*Milwaukee Co. v. Tomkins-Cristy Co.,* 155.

Mining Property. Mechanics' liens asserted against mining properties are governed by the same rules which control liens upon real property of other character (Rev. Stat. sec. 4028).—*Milwaukee Co. v. Tomkins-Cristy Co.,* 155.

Statement—Description—False Call Rejected. The lien statement described the premises by metes and bounds, as, "commencing at, etc." Considering that in the agreement under which the parties making the improvement were possessed of the premises, the word "six," in this description, was "*thence,*" that the center line of section 13, in which the premises were manifestly situate, nowhere intersects any line of sec. 6, and that, so far as appeared, the parties making the improvement, and who were designated in this statement as owners, owned no real estate in the vicinity, the false call was rejected.—*Miller v. Davis,* 483.

Description of the Building. The lien statement should describe the structure in respect of which the lien is claimed; but in view of the statutory provision requiring a liberal construction of the act (Rev. Stat., sec. 4043), *held,* a description of the land, omitting any description of the building, is not fatal.—*Miller v. Davis,* 483.

Lienable and Non-Lienable Items Confused. Where, though the evidence shows work done for the development, improvement or preservation of a mine, yet, if this is so confused with non-lienable items that the value thereof cannot be ascertained, no lien can be allowed.—*Empire Co. v. Rosa,* 230.

MECHANICS LIENS—Continued.

Statute Construed. The phrase "or other person" in Rev. Stat., sec. 4025 imports any person other than those named, *acting for the owner.—Empire Co. v. Rosa,* 230.

Under Rev. Stat., sec. 4025, the principal contractor for the erection, alteration, or repair of any of the structures mentioned, and the sub-contractor as well, is the agent of the owner of such structure to employ labor for the purpose of the contract, and, he observing the statute, the premises are subject to a lien for the just value of the labor so employed.—*Kennicott-Patterson Co. v. Modern Co.,* 135.

Sec. 4029, of the Revised Statutes, has no application to improvements made pursuant to a contract with the owner of the land.—*Miller v. Davis,* 483.

Encumbrances—Rank—Burden of Proof. The lien claimant asserting that an encumbrance is subordinate to his lien has the burden of proof.

As to structures erected and improvements made after the record of a mortgage the lien of a laborer is superior to that of the mortgage.—*Kennicott-Patterson Co. v. Modern Co.,* 135.

Pleadings. The complaint alleged plaintiff's employment by one West who was alleged to have been "the contractor" for the erection of the structure. In fact, during a portion of plaintiff's employment West was merely a sub-contractor under another. *Held* that the lien was not to be denied solely for this variance.—*Kennicott-Patterson Co. v. Modern Co.,* 135.

Where the party seeking enforcement of a lien relies upon the failure of the land owner to give the notice required by Rev. Stat., sec. 4029, his complaint must specifically allege facts which bring the case within the terms of that section.—*Empire Co. v. Rosa,* 230.

Contract Not Recorded. When the contract price exceeds $500, and neither the contract nor any memorandum of it is recorded, as required by the statute (Rev. Stat., sec. 4025), all labor performed in the execution of the contract is deemed in law to have been performed at the instanc of the owner.—*Kennicott-Patterson Co. v. Modern Co.,* 135.

If in fact the contract is recorded the land owner if he would avail himself of the record must make it appear. It is a matter of defense.—*Id.*

The provision of the statute (Rev. Stat. sec. 4025) requiring contracts for an amount exceeding $500.00 to be in writing refers only to contracts which provide for a contract price to be paid by the owner to the contractor. It has no application to the covenants of the lessee in an ordinary lease.—*Empire Co. v. Rosa,* 230.

MINING CLAIMS.

Location—Notice. The notice required by Rev. Stat., sec. 4197 serves a temporary purpose. Its utmost life is sixty days. In construing

the sufficiency of such notice the courts adopt the most liberal rules. The notice being written upon a piece of paper, folded so that no part of the writing appeared, laid upon a stone and held in place by another stone, *held* sufficient, though no other notice so far as appears, was ever posted. —*Emerson v. Akin*, 40.

Discovery in Abandoned Ground. The location of a lode mining claim must be within the unappropriated land of the public domain. One who has located a mining claim may abandon a portion of it, and may, by a discovery within the part so abandoned, effectually locate another claim.—*Emerson v. Akin*, 40.

Abandonment—Evidence. Abandonment of a mining claim in the public domain may be proven by the acts of the locator, as well as his declaration.—*Emerson v. Akin*, 40.

Effect. Where a mining claim, or any part of it, in the public domain, is abandoned by the locator, without improper motive, what is so abandoned immediately becomes part of the public domain.

Semble, otherwise as to a simulated abandonment, with intent to avoid performance of the annual labor, and so prolong the locator's right, without compliance with the statute (Comp. Stat. U. S., sec. 2324).—*Id.*

MINING PARTNERSHIP.

When It Exists. Three obtained a lease and bond of mining property, and having assumed possession agreed that all three "should and would work and operate the same in pursuance of said lease." The lease contained no provision as to the amount or character of the work to be done. *Held* that the agreement of the parties constituted them a mining partnership in the narrowest and most technical sense.—*Lamont v. Reynolds*, 347.

Right of Partner to Withdraw. In the absence of an agreement to the contrary, a member of a mining partnership may withdraw at any time.—*Id.*, 347.

Effect of Partner's Withdrawal. Where one partner ceases to work, and quits the premises, the partnership is terminated as to him, and, without some further agreement, he is not liable for the expense of further operations upon the property, nor entitled to any share of the profits thereof.—*Id.*, 347.

MUNICIPAL CORPORATIONS.

Ordinances—Validity. A charter power to regulate and license legitimate and useful occupations does not include the power of prohibition.

An ordinance prescribing the conditions under which theaters and moving picture shows shall be licensed and conducted, which assumes to make the granting of the license discretionary in the authorities of the town, is void.—*Krier v. Walsenburg*, 150.

NAMES.

Idem Sonans. Newberry and Nuberry are *idem sonans.—Gibson v. Staghorn Co.* 148.

One May Assume Any Name, at his pleasure, and may transact business therewith. He will be responsible under such assumed name.—*White v. Hartman,* 475.

NEGLIGENCE.

Definition. A charge that "negligence is the failure to observe, for the protection of others, that degree of care, precaution, and vigilance, which the circumstances demand," sustained.—*Colorado Springs Co. v. Marr,* 48.

No Injury Resulting. A corporation borrowed money of plaintiff, executing a promissory note for the amount, the secretary of the corporation subscribing the note merely as surety. Plaintiff sent his wife to collect the amount at maturity. She carried the note in an envelope. The president of the corporation paid the lady interest, and a portion of the principal and gave her in the envelope, a new note for the balance, subscribed by the corporation only. The lady had no knowledge of this substitution, nor of a like substitution, on a second occasion; nor was she authorized to consent to it. The original note coming afterwards to the hands of the plaintiff, he instituted an action thereon against both the principal and surety. The surety defended upon the ground that she had been informed by the president of the corporation that the note was paid, and that by the negligence of the plaintiff in the premises, she had been left in ignorance of the facts, lulled into a sense of security, and so lost an opportunity to protect herself. But it appearing that prior to the first substitution, the surety had become bankrupt, and therefore unable to have taken any steps for her protection, even if she had known all the facts, the defense failed.—*Agnew v. Mathieson,* 59.

Pleading. The complaint in an action for frightening plaintiff's horse should allege that the horse was an ordinarily gentle animal.—*Boulder v. Stewardson,* 290.

NEGOTIABLE INSTRUMENTS.

Delivery on Condition. A promissory note delivered on condition that it is not to be obligatory until subscribed by a third person is void in the hands of the original payee, if the condition is not performed.—*Dygert v. Clem.* 286.

In an equitable suit for the purpose it is proper to decree surrender of the note, which is equivalent to a cancellation, in the hands of defendants.—*Id.,* 286.

But judgment for the amount thereof was reversed, without prejudice to any right of action then existing, or any supplemental pleading allowed according to law.—*Id.,* 286.

NEW TRIALS.

Weight of Evidence. The weight of evidence does not depend upon its volume, or the number of witnesses. Jurors exercise a large discretion in judging of the credibility of witnesses, and separating the true from the false. Their conclusions will not be disturbed, unless the verdict manifests bias, prejudice, or a wanton disregard of their duties and obligations by the jurors.—*Clark v. Aldenhoven,* 501.

As a general rule, when the evidence is conflicting the trial court will refuse a new trial even though there may be a slight preponderance against the verdict. Its action will not be reviewed unless a manifest abuse of discretion appears.—*Id.,* 501.

In actions for tort a verdict will not so readily be vacated as against the weight of evidence, as in actions *ex contractu.* A verdict will not be set aside either in the trial court or the court of review unless it is so manifestly against the weight of evidence as to warrant a presumption that the jury misunderstood the evidence, or misconstrued its effect, or were influenced by improper motives.—*Id.,* 501.

The court of review will not interfere where there is evidence to support the verdict.—*Id.,* 501.

The trial judge having exercised extreme caution to protect the rights of the plaintiff in error, both in the admission and exclusion of evidence, and in the instructions the court of review declined to reverse his action in denying new trial.—*Id.,* 501.

Verdict Against Evidence. Plaintiff contending that his land had been entirely ruined by seepage from defendant's ditch was allowed the full value thereof. But there was evidence that in every year since such alleged injury, he had planted it, and had, in some years, secured crops of some value; and was intending to continue to cultivate and plant it in the future. A new trial was ordered.—*Larimer and Weld Co. v. Landers,* 1.

Excessive or Inadequate Damages, When a New Trial Will Be Granted for, rests in the discretion of the trial court, in cases where there is no legal measure of damages, or where the correctness of the result is not determinable by any definite and precise rule.—*Clark v. Aldenhoven,* 501.

Surprise. An application of defendant for a new trial on the ground of surprise in the evidence produced by plaintiff must be denied unless the attention of the court is called to the surprise at the time of the trial, and application made for some proper relief.

The pleadings examined, and held to fully advise the party of the claim asserted by her adversary.—*Agnew v. Mathieson,* 59.

Newly Discovered Evidence. The discovery, subsequent to the trial of a stated account in plaintiff's handwriting, showing the balance due him to be much smaller than his recovery. *Held* to entitle defendant to a new trial.—*Marshall v. Berry,* 236.

NEW TRIALS—Continued.

Motions for a new trial on the ground of newly discovered evidence are viewed with suspicion. The denial of such a motion will not be reviewed except for a gross abuse of discretion.—*Scbold v. Rieger*, 209.

The affidavits must show the efforts made by the applicant to locate the additional witnesses proposed to be examined, and must exclude all inference of delay or neglect on the part of the applicant.

Evidence as to matters not controverted on the trial will not suffice. —*Id.*, 209.

A new trial should not be granted to enable the applicant to take the deposition of a witness of infamous character.—*Agnew v. Mathieson*, 59.

NON-SUIT.

See TRIALS.

NOTICE.

Facts Putting Upon Inquiry. One who purchases lands with notice of facts which put him upon inquiry as to the title of his grantor is chargeable with notice only of those facts which diligent inquiry on his part would have developed.

The conveyance to his grantor having been made in fraud of creditors, it is not to be assumed that those participating in the fraud would have confessed their turpitude.—*Tibbetts v. Terrill*, 64.

S. had recovered a judgment against Lake County. An attorney was entitled to a lien thereon for his fees. *Held*, that the county taking an assignment from any person other than S. was chargeable with notice of whatever it might have learned by inquiry of S.—*Bell v. Lake County*, 192.

To Agent Affects Principal. The chairman of the board of county commissioners, while attempting to adjust a judgment theretofore recovered against the county, received actual notice of a lien against the judgment asserted by an attorney. *Held*, this notice affected the county; that it was not required that such notice should be in writing, or served upon the board while in session.—*Bell v. Lake County*, 192.

A corporation is affected by the knowledge of its officers and directors.—*German American Co. v. State Bank*, 242.

OVERRULED CASES.

See CASES OVERRULED.

PARENT AND CHILD.

Parent's Action for Death of Child. The phrase "lineal heirs," in Rev. Stat., sec. 649, is to be construed by reference to the law of descent, in force at the date of that enactment (Rev. Stat., sec. 7040), and other statutes *in pari materia* (Rev. Stat., sec. 2056); *Hendry v. Holt*, 24 Colo. 464, distinguished.—*Rocky Mountain Co. v. Koviacs*, 553.

PARTIES.

Who Is a Party. Mrs. Ellis, having recovered a judgment against Gibbons, levied her execution upon certain shares of corporate stock, as the property of Gibbons. Gibbons had previously pledged the stock, but had obtained a decree entitling him to redeem from the pledge. Subsequent to the levy of Mrs. Ellis' execution, Gibbons assigned the stock to Bordeleau, and Gibbons and Bordeleau interposed a motion in the case in which Mrs. Ellis had recovered judgment, to quash her levy. No objecion was taken below to the appearance of Bordeleau in this motion. Upon this ground, and because the relief which he sought by his motion was precisely the relief which would have been awarded to him if he had formally intervened, with success, he was regarded and treated, upon error brought, as a proper party below, though it was said that he should have proceeded by bill in equity, or by petition in intervention.—*Ellis v. Gibbons,* 454.

Plaintiffs. Action for deceit in the sale of land. Plaintiff produced a contract executed by defendant to him, plaintiff, alone, and a conveyance by the land owner to plaintiff and his wife. On motion to dismiss for nonjoinder of the wife, plaintiff offered to show that he contracted for himself alone, that he alone paid the consideration money, that the wife was not present when the alleged false representations were made, and that they were never communicated to her. *Held* that the wife had no right of action, and to allow the motion was error.—*Tempel v. Idler,* 562.

Real Party in Interest. The assignment of a chose in action for collection, vests the legal title in the assignee. He is entitled to maintain an action thereon in his own name.—*Ballinger v. Vates,* 116.

Necessary Defendants. Ejectment for the west two-thirds of a certain block. The existence of a street within the limits of the east one-third does not make it necessary to bring in the town as a party.—*State Co. v. Matz,* 511.

Misjoinder of Plaintiffs—Effect. Under the code the fact that one of those joined as plaintiffs has no right does not defeat even an action at law. Those entitled may have judgment, the cause being dismissed as to the other plaintiff, or judgment given against him if the facts demand it.—*Reyer v. Blaisdell,* 387.

Nonjoinder of Defendant, when not pleaded is no bar to an action against one of several liable as partners or associates. Rev. Code, sec. 61.—*Bloom v. McPhee and McGinnity Co.,* 256.

PARTNERSHIP.

Dissolution—Partnership at Will. A partnership at will may be dissolved by either partner, at his pleasure, at any moment. The mere withdrawal is, in law and in fact, a dissolution.—*Ruth v. Flynn,* 171.

Two partners entered into an agreement of dissolution. One was made the trustee, for "winding up the affairs of the dissolved partnership;" the authority of the other to check against the bank account was

PARTNERSHIP—Continued.

revoked; an arbitrator was appointed to adjust their differences; and each partner engaged in business on his own account, taking on no new business on account of the firm. The agreement provided that certain contracts previously taken by the firm should be "completed by both parties * * * exactly as if the partnership was still existing." *Held,* that the firm was dissolved at the date of this agreement. *Held further,* that no creditor of the firm having, so far as appeared, any notice of the execution of a policy of insurance on the life of one of the partners, subsequently deceased, nor having extended any credit on the face of such policy, the surviving partner should not be heard to assert, as the representative of creditors, a claim for the insurance money; but that, in the adjustment of the partnership affairs he would be entitled to credit upon premiums which he had paid upon the policy.—*Id.,* 171.

PASSENGER CARRIER.

Duty to Passenger. A charge that it is the duty of a public carrier "to exercise the highest degree of care, skill and vigilance, reasonably practicable in the conduct of its business, to avoid injury to the passenger," was sustained, though making no allusion to "the mode and character of the conveyance."—*Colorado Springs Co. v. Marr,* 48.

PATENTS.

Patent for Invention—Validity—Jurisdiction of the State Courts. The courts of the state may try the validity of a patent for an invention.—*Gougar v. Buffalo Co.,* 8.

PERSONAL LIBERTY.

See EXECUTION AGAINST THE BODY.

PLATS, OF TOWN-SITE.

See TOWN-SITES.

PLEADING.

Complaint. In an action for negligence occasioning fright of plaintiff's horse, the complaint should allege that the horse was an ordinarily gentle animal.—*Boulder v. Stewardson,* 290.

Construed. Complaint demanding specific performance of a contract for the lease and sale of a mine by Lamont and the other defendant, to plaintiffs and Lamont, alleged that "the relations between plaintiffs and Lamont became strained, in consequence of differences as to the proper method of working, and at, etc., the said Lamont ceased to work at said mine." *Held* to import that Lamont withdrew from the venture and surrendered all interest as co-lessee.—*Lamont v. Reynolds,* 347.

Plaintiff's complaint demanded possession of certain lands, and throughout the trial he insisted that the conveyances which he produced

PLEADING—Continued.

conveyed the premises demanded. *Held,* that the action was an action at law.—*State Co. v. Matz,* 511.

Parents brought their action for negligence causing the death of their son, alleging that "the plaintiffs—mother and father," etc. *Held* mere recital of the relationship, and not an averment thereof.—*Rocky Mountain Co. v. Koviacs,* 554.

An action against the master for the death of a servant, the complaint attributing the death to a neglect made actionable by a particular statute, must be held to be founded upon such statute.—*Id.,* 554.

The averment of facts showing negligence will suffice, though there is no express allegation of negligence.—*Colorado Springs Co. v. Marr,* 48.

Averments on Information and Belief. A petition for mandamus joined the mayor and trustees as defendants, under an averment that "plaintiff is informed and believes," that the officers named "claim the right to direct the said clerk," is incompetent for any purpose and should be stricken out on motion.—*Krier v. Walsenburg,* 150.

Answer—General Denial. Where, in pleading a judgment the facts which conferred jurisdiction of the person are expressly alleged, *e. g.* that the defendant was "duly and legally summoned," the opposing party may under a general denial, disprove the allegation by introducing the judgment roll.—*Gibson v. Staghorn Co.,* 148.

Pleading—Jurisdiction. Even in alleging the judgment of a court of special jurisdiction the pleader is not required to state the facts which gave jurisdiction of the person. (Code sec. 71.)—*Id.,* 148.

Demurrer, for ambiguity, must show the particulars wherein the ambiguity exists.—*McCreary v. Brady,* 297.

Motion to Strike. Waives all grounds not alleged.—*Gougar v. Buffalo Co.,* 8.

Judgment on the Pleadings, should be granted only where this must be the ultimate result, whatever may be the findings upon the facts.—*Moore v. Kline,* 334.

Defendants had leased to plaintiff a store building then in course of construction, and executed to him a writing substantially in these words: "We bind ourselves in the sum of $1,500.00 that the store leased by us to H. B. Kline will be completed on or before, etc., and that said Kline will be given possession thereof as soon as completed; this guarantee to be void if possession is given within the time specified, otherwise in full force, and said sum of $1,500.00 is to be paid to said Kline." Judgment on the pleadings in favor of plaintiff. No reason moving the court to such judgment appearing in the record, *held* that it must have been given upon the assumption that the moneys set down in the writing constituted, in law, liquidated damages, and that as this assumption was inadmissible, the judgment was erroneous.—*Id.,* 334.

PLEADING—Continued.

Prayer, in a bill of foreclosure, for "such further relief as may be meet and agreeable to equity," warrants a personal judgment against the mortgagee for any deficiency in the proceeds of the sale of the mortgaged lands.—*Continental Co. v. Patterson,* 186.

Plaintiff is entitled to such relief as the facts alleged and established warrant, regardless of the prayer, or the frame of the complaint.—*Reyer v. Blaisdell,* 387.

Amendments—Liberality to Be Exercised. Courts should be very liberal in allowing amendments to answers. A new defense may be admitted as an amendment.

Defendants had executed an agreement admitting the validity of certain patents for an invention, claimed by the assignor of plaintiff, and past infringements thereof, covenanting not to infringe the same in future, and in case of such future infringement, to pay $500.00 as liquidated damages for such past infringements. Action to recover the $500.00. Defendant was permitted to put in a supplemental answer to the effect that the agreement was entered into on the faith of plaintiffs' representation that the patents were valid, etc., whereas defendant had since ascertained that they were without validity, and that plaintiff had no valid patent or monopoly.—*Gougar v. Buffalo Co.,* 8.

Waiver. Plaintiff by replying to an answer does not waive the objection that it fails to state facts sufficient to constitute a defense.—*Gibson v. Huff,* 144.

Defective Allegations, e. g. by way of recital should be assailed by motion to make more specific; otherwise the objection is waived.—*Rocky Mountain Co. v. Koviacs,* 553.

An objection to the evidence offered to establish matter merely recited, upon the ground that the complaint does not state a cause of action, is equivalent to a general demurrer, and is properly overruled.—*Id.,* 553.

PLEDGE.

Pledgee—Authority. One holding negotiable paper pledged to her as collateral security recovered judgment thereon and afterwards agreed with an attorney that, for his services in enforcing the judgment, and compelling payment thereof, he should receive twenty per cent of the amount collected. The agreement was within her authority.

Such agreement of the pledgee operated as an equitable assignment, *pro tanto,* and gave the attorney a lien upon the judgment for the stipulated fee.—*Bell v. Lake County,* 192.

PRACTICE.

Appearance—Effect. A general appearance cures all defects in the service of the summons.

By filing a motion to vacate a judgment by default, in no manner limiting his appearance, the defendant waives all defects in the service of the summons.—*Hollingsworth v. Ring,* 121.

It seems that where a receiver answers a complaint, filed in a court other than that in which he was appointed, making no objection to the jurisdiction, he will not be heard to afterwards question the jurisdiction upon the ground that the consent of the court of appointment has not been obtained.—*Continental Co. v. Patterson,* 186.

PRACTICE IN SUPREME COURT.

See APPEALS AND ERROR.

PRECEDENTS.

Effect. The general language of a judicial opinion is to be read in connection of the facts of the particular case.—*Tibbetts v. Terrill,* 64.

Upon Questions of Commercial Law, the court will search the opinions of the Supreme Court of the United States.—*Asmussen v. Post Co.,* 416.

PRINCIPAL AND AGENT.

Evidence of Agency. It seems that the mere fact that the owner of land executes a conveyance thereof, pursuant to the contract of another, is not even *prima facie* evidence that the vendor was agent of the land owner.—*Ritter v. Idler,* 560.

Instructions of Principal. The agent may obey the verbal instructions of his principal, though a departure from the writing by which the agent was employed.—*Paulsen v. Rourke,* 488.

Agent Acting for Self. The principal is not responsible for the acts and representations of the agent while known to be acting for himself.—*Rocky Mountain Co. v. Sparling Co.,* 260.

Principal Liable for Frauds of Agent. It seems that one who employs another to sell land may be liable for material misrepresentations of the agent inducing the purchase.—*Tempel v. Idler,* 562.

Liability of Agent for Acts or Representations of Associate. Defendants had agreed with the plaintiff to allow him a share of the profits on all lands sold by them to any person directed to them by plaintiff, and plaintiff had agreed to "deal with no other person," etc. Plaintiff demanding a share of the profits alleged to have been made by defendants in a sale to one McClure, who resided in Kansas, it appeared that one Baker, who was associated with plaintiff, and who also resided in Kansas, had on the occasion of McClure's visit to Colorado, at the time of his purchase, recommended to him to see another firm of land agents, who he stated, were more reliable than defendant. The court charged

PRINCIPAL AND AGENT—Continued.

that in this Baker was guilty of bad faith, and "being the agent of plaintiff, such act was the act of plaintiff, and he thereby forfeited all rights to profits, upon the sale to McClure."

It appearing, that while Baker was acting as the representative of plaintiff, he was also acting in an independent capacity, as the agent of others, and among them McClure, the instruction was prejudicially erroneous, because assuming that in the statement imputed to him Baker was acting as the agent of plaintiff, and because even though Baker was in fact acting for plaintiff, in making the statement attributed to him, it was not to be conceded as matter of law that plaintiff, though Baker acted without his consent, knowledge or ratification, forfeited his right to share in the profits in the sale made to McClure.—*Hughes v. Kerr,* 162.

Plaintiff's Repudiation of the Acts of His Agent must be entire. He may not, knowing all the facts, approve and accept the acts of the agent, and then repudiate them in part, to the injury of third persons.

Defendant authorized Smith to sell a tract of land at $92.50 per acre, retaining the $2.50 as his commission. Smith solicited the assistance of plaintiff, and thereby found a purchaser at $100 per acre, it being agreed that plaintiff should receive a commission of $7.50. Defendant, knowing all the facts, assented to the transaction, without objection or protest, executed a conveyance to the client of plaintiff, and received the purchase money, but refused to pay plaintiff any part thereof, alleging that he had never employed them, nor was in any way obligated to them. Judgment for plaintiff affirmed.—*Council v. United States Co.,* 284.

QUIETING TITLE.

Plaintiff's Title. Plaintiff is not required to show a perfect indefeasible title; but he must show both possession and a *prima facie* title.—*Strauss v. Thomas,* 213.

Possession of Lands. A warranty deed, executed by one in possession, purporting to convey the lands, in fee, to plaintiff, with possession following thereunder, is *prima facie* evidence of title in fee in the plaintiff, and casts upon the defendant the burden of dispelling the *prima facie title* so exhibited. *Clark v. Huff,* 49 Colo. 197, distinguished.—*Id.,* 213.

Tender of Taxes, paid by one claiming under a tax sale, is not required as a condition precedent to a bill by the paramount owner to quiet his title.—*Miller v. Weldon,* 111.

After Acquired Title. A title acquired after the institution of the action does not avail.—*Empire Co. v. McPherin,* 225.

QUO WARRANTO.

Where the Writ Lies—Public Interest. The proceeding has no place when the injury complained of is entirely private, and the interest of the public in no way involved.—*People v. Lockhard,* 439.

But that the relator seeks the redress of a private wrong, and that this is the main purpose, upon his part, in the institution of the proceeding, has not the effect to reject from consideration the interest of the public, apparent in the record. Allegations that the defendants unlawfully assume to be and act as the directors of an irrigation district, never lawfully organized, that they have incurred large expenses, and are proposing to issue in the name of such supposed district, bonds to the amount of $200,000, and will sell them at a rate less than that prescribed by statute, sufficiently discloses the interest of the public.

Each case must be determined upon the particular facts thereof.

The mere fact that all other citizens of the district are opposed to what the relator desires does not conclusively negative the public interest. *People v. Colorado, etc., Co.,* 8 Colo. App. 301; *State Railroad Commission v. Denver, etc., Co.,* 44 Colo. 345; *State v. Atcheson Co.,* 176 Mo., distinguished.—*Id.,* 439.

Leave of the Court Unnecessary, when the district attorney has given his consent.—*Id.,* 439.

Relator, Who May Be. The owner of land within the limits of an alleged irrigation district, subject to taxation for the expenses of the district, and for the payment of bonds which it may issue, may be the relator in *quo warranto* to question the legality of the district organization.—*Id.,* 439.

Defendants. Quo warranto assailing the organization of a corporation, the supposed corporation is not a necessary party.—*Id.,* 439.

RESERVOIRS.

See WATER RIGHTS.

ROADS.

See HIGHWAYS.

SALES.

Title Acquired. The general rule is that the buyer takes only such title as the seller has, and is authorized to transfer.—*Rocky Mountain Co., v. Sparling Co.,* 260.

Exceptions—Negotiable Paper—Bills of Lading. To this rule negotiable paper is an exception.

So also the transfer and delivery to a *bona fide* purchaser of a bill of lading, endorsed and delivered by the consignor and original owner.

But bills of lading are not negotiable in the broad sense in which the word is applied to negotiable paper. To bar the claim of the defrauded vendor, in such case, it must appear, (1) That he parted with the pos-

SALES—Continued.
session of the goods, or the muniments of title, with intent to pass title to the wrongdoer. A felonious taking, or a taking against the owner's consent confers no title even upon a subsequent *bona fide* purchaser without notice. (2) That the purchaser acquired title from the wrongdoer, without notice of the defects in his title, or of circumstances which would have put a reasonably prudent person upon inquiry as to the source of the title. (3) The purchaser must have made advances or incurred liabilities on the faith of the title so presented to him. A previous loan of money, set off against the price of the goods, will not suffice.

Stewart had for years been in plaintiff's employ as sales agent, and never engaged in business for his own account. This was known to defendant, who had often dealt with him in his representative capacity. Stewart represented to defendant that he was about to undertake business on his own account; that he had taken over the product of a new mine, and desired defendant's patronage, offering as an inducement, to set off against the price of the purchase ($75), an indebtedness for money previously loaned him by defendant. The defendant assenting to the proposition, Stewart, shortly thereafter, came to defendant, producing bills of lading for coal, showing upon their face that the coal was from an old mine, the product of which had long been upon the market, and that the coal had been diverted to defendant through the agency of plaintiff. Defendant purchased the coal, deducting from the price the indebtedness of Stewart, and making payment of the balance within $32.00.

Held that in any view of the case defendant was liable to plaintiff for the $75.00, not paid on the bill of lading, and for the $32.00 not paid at all; and that defendant's knowledge of the position of Stewart as the agent of plaintiff, and that, as appeared by the bills of lading, the coal had been shipped to plaintiff, should have put defendant upon an inquiry, which, if pursued, would have disclosed that plaintiff was the real owner of the coal.—*Rocky Mountain Co. v. Sparling Co.,* 260.

SCHOOLS.

Teacher—Employment of Disqualified Person. Under Rev. Stat., sec. 5990, the contract of a school district to employ as a teacher a person having no license to teach, is absolutely void. It binds neither party and requires no revocation.—*School District v. Johnson,* 433.

The mere fact that the person employed secured a license before the term appointed for her labors to begin, makes no change in the rule.

Otherwise, if, being so qualified, she is permitted by the school board to proceed with the performance of her contract. *Hotz v. School District,* 1 Colo. App. 40, and *School District v. Ross,* 4th Colo. App. 493, distinguished.—*Id.,* 433.

That the school board neglected to notify the teacher that her employment had been revoked, until the day before the term of her employment was to begin, *held* immaterial.—*Id.,* 433.

SEAL.

Voluntary Association, is not required to have a seal—*White v. Hartman,* 475.

SPECIFIC PERFORMANCE.

Contract—Consideration. Agreement for the exchange of lands. A promise of one to convey, is a consideration for the like promise of the other, sufficient to sustain a bill for specific performance. *Winter v. Goebner,* 2 Colo. App. 259, explained.—*Gibson v. Riehle,* 127.

Mutuality—Conditional Agreement. Agreement for the exchange of real property, conveyance to be made by each to the other, at a day and place stipulated, provided the property of plaintiff, on inspection, should prove satisfactory. The defendant having before the day appointed for the exchange of conveyances inspected the plaintiff' land, and declared himself satisfied therewith, the covenants thereupon became mutual, and plaintiff was held entitled to enforce specific performance.—*Id.,* 127.

STATUTES CONSTRUED, CITED OR REFERRED TO.

Revised Statutes—

Sec.

649 *Rocky Mountain Co. v. Koviacs,* 554.
696 *Milwaukee Co. v. Tomkins-Cristy Co.,* 155.
1215, 1216 *Mugrage v. People,* 27.
1526 *Flynn v. Casper,* 344.
1536 *Hollingsworth v. Ring,* 121; *Flynn v. Casper,* 344.
1562, 1564 *Thomas v. Teller County,* 139.
2056 *Rocky Mountain Co. v. Koviacs,* 554.
2067 *Cohen v. Fox,* 55.
2494 *Carson v. Cudworth,* 131
2554 *Thomas v. Teller County,* 139.
2662 *Workman v. Stephenson,* 339.
2666 *School District v. Johnson,* 433.
2950 *White v. Hartman,* 475.
3024 *Cohen v. Fox,* 55.
3440, 3442 *People v. Lockhard,* 439.
3617 *Ellis v. Gibbons,* 454.
3622 *Id.*
3666 *Bloom v. McPhee & McGinnity Co.,* 256.
3837 *Union Pacific Co. v. Wolfe,* 567.
3847 *McCreary v. Brady,* 297.
3851 *Id.*
4025 *Kennicott-Patterson v. Modern Co.,* 135; *Empire Co. v. Rosa,* 230.
4028, 4029 *Empire Co. v. Rosa,* 230; *Miller v. Davis,* 483; *Milwaukee Co. v. Tomkins-Cristy Co.,* 155.
4043 *Miller v. Davis,* 483.

STATUTES CONSTRUED, CITED OR REFERRED TO—Continued.

4089, 4090 *King v. Foster*, 120; *Gibson v. Huff*, 144; *Empire Co. v. McPherrin*, 225; *Empire Co. v. Brownson*, 228; *Miller v. Weldon*, 108.

5733 *Miller v. Weldon*, 108; *Empire Co. v. Brownson*, 228; *Empire Co. v. Weldon*, 111; *Hapney v. Dunn*, 412.

5990 *School District v. Johnson*, 433.

7040 *Rocky Mountain Co. v. Koviacs*, 554.

Ch. LXI *Flynn v. Casper*, 344.

Laws—

1887, 314 *Edwards v. Roberts*, 538.

1909, c. 205, § 7 *Phillips Co. v. School District*, 362.

1911, c. 107, § 5 *Curry v. Equitable Co.*, 472.

Pacific Railroad Acts (12 Stat. 1492, 14 Stat. 253, 16 Stat. 218) *Edwards v. Roberts*, 538.

Revised Code—

Sec.

36 *Griffing v. Smith*, 220.

41 *Id.*

50 *Id.*

61 *Bloom v. McPhee & McGinnity Co.*, 256.

71 *Gibson v. Staghorn Co.*, 148.

81 *Hollingsworth v. Ring*, 121.

98 *Dygert v. Clem*, 286.

99 *Id.*

115 *Reyer v. Teare*, 368.

157 *Ellis v. Gibbons*, 454.

185 *Griffing v. Smith*, 220.

241 *Reyer v. Blaisdell*, 387.

320 *People v. Lockhard*, 439.

331 *Union Pacific Co. v. Wolfe*, 567.

STATUTE OF FRAUDS.

Contract Not to Be Performed Within One Year. Verbal contract made in April for the employment of a teacher, her services to begin in the next September, and continue till the May following, is void. The year commences with the making of the contract.—*School District v. Johnson*, 434.

Debt of Another. One member of an association orders goods for their joint account, directing the seller "to send the bill" to him, that he will see to its payment. The direction does not constitute a special promise to answer for the debt of another. Rev. Stat., sec. 3666.—*Bloom v. McPhee & McGinnity Co.*, 256.

Easement by Parol. As a general rule a parol agreement will not be received to establish an easement where the statute of frauds is pleaded. *Workman v. Stephenson*, 339.

SUBROGATION.

The Doctrine of Examined. Opinion of Cunningham, P. J., in *Tibbetts v. Terrill,* 64.

Mortgage. As a general rule where a purchaser's title fails, he will be subrogated to the right of the holders of prior encumbrances which he has paid, or which have been discharged out of the purchase money.

But a fraudulent grantee who knowingly participated in the fraud has no standing in the court of equity, and will not be subrogated, or in any way protected as to moneys paid by him to discharge liens existing at the date of the fraudulent purchase.

Terrill purchased lands of Dickenson. Part of the purchase price was represented by a mortgage to Dickenson. Terrill afterwards conveyed the lands to his wife, without consideration, and for the sole purpose of defeating the just claim of a creditor. Alley subsequently purchased the lands from the wife of Terrill, with constructive notice of the fraudulent character of her title, but without actual notice of the fraud, and acting in entire innocence. His title being vacated on bill brought by the creditor, he was allowed moneys paid by him to discharge the mortgage to Dickenson.

But he was denied any allowance for moneys paid to discharge a mortgage executed by Terrill's wife, after a judgment recovered by the creditor had become a lien upon the land.—*Tibbetts v. Terrill,* 64.

SUMMONS.

Requisites—Statement of Demand. Under Secs. 36, 41, of the Revised Code a summons not stating the sum demanded, but that the action is "brought to recover salary for services as foreman," at a mill named, during a period mentioned, and referring to the complaint for a more particular statement, is sufficient to sustain a judgment entered by the court, upon evidence heard, after a default entered by the clerk. Whether sufficient to sustain a judgment by default, entered by the clerk. Query?—*Griffing v. Smith,* 220.

SUNDAY.

Election Notice Posted Upon. The notice for a school district election, upon the question of issuing bonds for raising funds to construct and equip a school-house, may be effectually posted upon a Sunday.—*Phillips Co. v. School District,* 362.

TAX TITLES.

Void Deed. A treasurer's deed reciting a sale to the county, and an assignment of the certificate of purchase by the county clerk more than three years thereafter, is void upon its face.—*Miller v. Weldon,* 108; *Empire Co. v. Weldon,* 111; *Empire Co. v. McPherrin,* 225.

So a treasurer's deed reciting a sale to the county upon the day on which the land was first offered.—*Empire Co. v. Weldon,* 111.

TAX TITLES—Continued.

So a treasurer's deed reciting the sale of non-contiguous lands *en masse*, for a gross sum.—*Empire Co. v. Brownson*, 228; *Empire Co. v. McPherin*, 225.

TORTS.

Redress by Act of Parties. No one may lawfully construct his flume across the way of another's ditch, without consent of the other, and if he does so the owner of the ditch may remove it.—*Larimer and Weld Co. v. Landers*, 1.

TOWNS.

Filing Plat of Townsite—Effect. The owner of lands files in the Recorder's office a town plat thereof showing lots, blocks and streets, but not acknowledged. This, with subsequent conveyances of lots, with reference to the plat, constitutes an offer to dedicate to public use the streets defined in the plat. The offer must be accepted by the public within reasonable time, or the right to accept is lost.—*Town of Center v. Collier*, 354.

Acceptance, may be manifested by an ordinance or resolution, by possession taken and improvements made, by use of the public for travel, and the like.—*Id.*

Revocation. If the land owner, after the lapse of a reasonable time, without acceptance, conveys the lands designated upon the plat as a street, this is a revocation of the offer to dedicate.—*Id.*

TOWN-SITES.

Confirmation of Prior Deeds in the Certificate to Plat of a Town-Site. Ejectment for part of the west two-thirds of block 15, in the town of Ordway. Plaintiff claimed under a conveyance describing the block by its number merely, "according to the plat and subdivision * * * made by the Ordway Town and Land Company." The only plat of record showed the east line of block 15 to be coincident with the west line of block 16. Defendant claiming that in fact the premises in controversy were a public street, produced an old plat inscribed "Plat of the Town of Ordway," made in 1890, showing a street 80 feet wide through block 15. This plat had never been recorded and there were thereon no words of dedication. It had never been promulgated by the town company, nor referred to in any conveyance by that company. A plat authenticated by the officials of the company, and recorded at a later date, showed block 15 entire, and not intersected by any street, and a certificate of authentication thereon declared that it was made "in strict accord with deeds heretofore made," and "confirms said deeds and description." *Held*, a clear repudiation of the elder plat.—*State Company v. Matz*, 511.

TRESPASS.

To Lands—Irrigation Works. Neither the acts of Congress in relation to the public domain, nor the statutes of the state regulating irrigation, permit an entry upon the irrigation works of another, without his consent, or appropriate proceedings at law.—*Larimer County Co. v. Weld Co.,* 380.

TRIALS.

Questions for Jury—Contributory Negligence—For the Jury, where the evidence is such that a jury of intelligent, upright and reasonable men, may honestly exonerate the one whose conduct is in question.—*Rocky Mountain Co. v. Koviacs,* 553.

Plaintiff Bound by His Complaint, and will not be allowed to so shift his contention as to exclude a legitimate defense to his action as therein stated.—*McCutchen v. Klaes,* 378.

Non-Suit, is to be granted only where there is an entire absence of testimony.—*Whitehead v. Valley View Co.,* 114.

Motion for, admits the truth of the evidence produced by the plaintiff, in the sense most unfavorable to defendant, and every inference of fact legitimately deducible therefrom.—*Id.,* 114.

Directing Verdict—Ordering Non-Suit. Great caution should be exercised by the courts of first instance in considering motions of this character. They should never be granted in doubtful cases.—***Paulsen v. Rourke,*** 493.

Pleading and Evidence—Variance. Where the instructions direct the attention of the jury to the real question in issue, a variance not misleading will be disregarded.

The complaint of a passenger against the carrier alleged that while plaintiff was upon the step of defendant's car, and in the act of alighting, the car was violently started, etc. The evidence was that plaintiff had in fact alighted, and placed her knee upon the running board, in the act of reaching for her luggage, and that while so engaged and in full view of the conductor, the car was started. Judgment for plaintiff was affirmed.—*Colorado Springs Co. v. Marr,* 48.

Failure of Proof. Where the action is founded upon allegations of fraud which are controverted by defendant and the plaintiff entirely fails in his proofs, judgment for the defendant follows as of course.—*Ford v. Sweet,* 564.

TRUSTS AND TRUSTEES.

Trustees—Joint Must Act Jointly. Where, in a private trust, there are several trustees, and all have accepted, and are acting, they must act as a unit, save where by the instrument creating the trust, or by statute, authority is given to a less number than the whole, or possibly in case of an emergency. Such authority, or such emergency, will not be presumed. —***Page v. Gillett,*** 204.

TRUSTS AND TRUSTEES—Continued.

Authority of Beneficiary in a Trust. Schradsky recovered judgment against Lake County upon certain coupons assigned to her by one Johnson, as collateral to a loan. As against Johnson, Sullivan was entitled to an interest in the proceeds of the judgment. *Held,* that an assignment by Sullivan to the county of his interest in the judgment, was without effect as against the lien of an attorney employed by Schradsky to enforce payment of the judgment.—*Bell v. Lake County,* 192.

VENDOR AND VENDEE.

Defective Title Conveyed—Remedies of Vendee. Where the vendor having stipulated to convey a merchantable title delivers a conveyance which, while assuming to convey a perfect title, in fact passes no title at all, and having received part of the purchase money still retains possession of the land, the vendee may sue to rescind. He is not remitted to an action upon the covenants in the deed.—*McCutchen v. Klaes,* 374.

Vendee Entitled to a Merchantable Title. Under an executory agreement for the conveyance of real estate the vendee is entitled to a marketable title, unless he has expressly agreed to accept whatever title the vendor may be able to convey.—*McCutchen v. Klaes,* 374.

WAIVER.

Of Order Dissolving Attachment. Defendant having obtained an order dissolving an attachment afterwards stipulated that the issues in the main cause, as well as those framed upon the traverse of the affidavit in attachment should be tried at the same time. *Held,* that he thereby waived the order dissolving the attachment, and all rights thereunder.—*Reyer v. Blaisdell,* 387.

WATER RIGHTS.

Nature and Foundation of the Right. The right of the citizen to occupy the lands of the public domain in the arid region for the construction of ditches and reservoirs for irrigation has its foundation in necessity. The right always existed, and the acts of Congress which seem to grant such right, in reality only recognize and confirm it.—*Edwards v. Roberts,* 538.

The act of Congress of July 26, 1866 (14 Stat. at Large, page 253, and its amendments) operate as a reservation from the congressional grant of land to the Union Pacific Railway Company in aid of the construction of its railroad, and in favor of the owners of irrigation ditches and reservoirs used in connection with water rights which became vested under the local customs and laws prior to the issuance of patent to the railroad company. *Tynon v. Despain, 22* Colo. 240; *Highline Canal Co. v. Moon, Id.* 560, followed.—*Id.,* 538.

No distinction is recognized between ditches and reservoirs for irrigation.

WATER RIGHTS—Continued.

The right of the appropriator depends solely upon the reservation under the act of Congress, and not upon any agreement, express or implied.—*Id.*, 538.

Reservoirs—Easement for—Extent of. The area to which the lands of one person may be submerged by the reservoir of another, constructed while such lands were part of the public domain, is not to be extended beyond the limit of actual use, and should be restricted to the smallest area consistent with the useful enjoyment of the reservoir.—*Id.*, 538.

Claim of Reservoir Site. The map of a reservoir site, with the required statement thereon, filed pursuant to the act of April 20, A. D. 1887 (Laws 1887, 314) is constructive notice of the contents thereof to all persons subsequently dealing with the lands described therein, as to the site of the reservoir.—*Id.*, 538.

Intermittent Use of Works for the Use of Water—Effect Upon the Right. The use of works for irrigation, is, in all cases, with us, necessarily intermittent, depending upon the season, the crop, the rainfall, the relative priority of different ditches and reservoirs, and other similar considerations; but the easement is necessarily continuous. Interruption of the use by the absence of water in the stream which is the source of supply, or the casual destruction of the works of diversion or storage, by floods, or the like, has not the effect to impair the appropriator's right.—*Id.*, 538.

WRIT OF ERROR.

See APPEALS AND ERROR.